Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

FAIRWAY FOODS, INC. AND HENKEL CORPORATION,
*Petitioners,*

v.

STATE OF MINNESOTA AND JAMES L. GIRARD,
IN HIS CAPACITY AS COMMISSIONER OF REVENUE,
*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a taxpayer can use uncontroverted mathematical formulae and a hypothetical set of facts which illustrate these mathematical formulae to show that the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base violates the ***bright line*** "internal consistency" requirement established by the United States Supreme Court pursuant to the Commerce Clause of Article 1, Section 8, Clause 3 of the United States Constitution.

## RULE 29.6

## LIST OF ALL PARTIES

~~Juba's Inc.~~

Henkel Corporation
Parent Companies:
Henkel of America, Inc.
Henkel KGaA

Fairway Foods, Inc.
Parent Company:
Holiday Stationstores, Inc.

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**REFERENCE ABBREVIATIONS**

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Transcript of Proceedings—"Testimony" or "Trial Transcript"
Opinion of Minnesota Supreme Court—"Sup. Ct. Op."
Trial Court Opinion—"Tr. Ct. Op."

## PETITION FOR WRIT OF CERTIORARI

Petitioners, Fairway Foods, Inc. and Henkel Corporation, respectfully pray that a writ of certiorari be issued to review the order and judgment of the Minnesota Supreme Court entered in this proceeding on May 20, 1996. The Minnesota Supreme Court decided a constitutional question of national importance that conflicts with and blurs the bright-line internal consistency test for state taxation under the Commerce Clause as established by this Court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

## OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported as *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285 (Minn. 1996), and is reprinted in the Appendix hereto, at App. A at 1a-14a.

The Findings of Fact, Conclusions of Law and Order for Judgment of Judge M. Michael Monahan of the Ramsey County District Court were issued on June 19, 1995 and have not been reported. It is reprinted in the Appendix hereto, at App. B at 15a-39a.

## JURISDICTION

The order and judgment of the Minnesota Supreme Court were entered on May 20, 1996. No petition for rehearing was sought. This Petition is filed within 90 days of the entry of judgment of the Minnesota Supreme Court as allowed by 28 U.S.C. § 2101(c) and U.S. Supreme Court Rule 13.1.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) on the grounds that the final judgment of the Minnesota Supreme Court upholds the validity of a Minnesota tax statute which Petitioners believe violates the "internal consistency" requirement of the Commerce Clause to the United States Constitution.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, provides:

> The Congress shall have Power . . .
>
> * * * *
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, Amendment XIV, Section 1, provide in relevant part that: "[N]or shall

any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Relevant sections of the Minnesota Franchise Tax on Corporations tax statutes, Minn. Stat. § 290.02 (1987 Supp.), Minn. Stat. § 290.06 (1987 Supp.) and Minn. Stat. § 290.092 (1987 Supp.), are set forth at App. C. at 40a-44a.

## STATEMENT OF THE CASE

### 1. Nature of the Controversy.

The issue raised by this case involves a decision of the Minnesota Supreme Court that establishes an additional burden of proof beyond that heretofore required by the United States Supreme Court for a taxpayer to show a state tax structure violates the bright-line internal consistency test under the Commerce Clause of the United States Constitution.

The Minnesota Supreme Court held a taxpayer cannot meet its burden of proof to show a violation of the Commerce Clause by showing that the Minnesota tax structure in issue lacks the requisite mathematical symmetry necessary to satisfy the internal consistency test and that, therefore, the tax structure is *capable* of resulting in higher overall tax liabilities for every taxpayer doing business in interstate commerce, including the Petitioners herein, as compared to taxpayers doing business wholly within the State of Minnesota.

There are 101 cases pending in the Ramsey County district seeking refunds of the Minnesota Alternative Minimum Tax on Corporations. Tr. Ct. Op. at App. B at 15a.

The facts of the case, which have substantially been stipulated between the parties, are not in dispute.[1]

## 2. Fairway Foods, Inc.'s Business.

Petitioner Fairway Foods, Inc. ("Fairway Foods") is a Minnesota corporation with its principal place of business in Minneapolis, Minnesota. Tr. Ct. Op. at App. B at 21a, Stip. ¶¶ 56, 57. Fairway Foods is engaged primarily in the wholesale grocery business. Tr. Ct. Op. at App. B at 21a, Stip. ¶ 58. Fairway Foods did business in fourteen states, including Minnesota, during the taxable year in issue, which was the taxable year ending December 31, 1987.

## 3. Henkel Corporation's Business.

Petitioner Henkel Corporation ("Henkel Corp.") is a Delaware corporation with its principal place of business in Gulph Mills, Pennsylvania. Tr. Ct. Op. at App. B at 16a, Stip. ¶¶ 1, 2. Henkel Corp. is engaged primarily in the business of manufacturing chemicals. Tr. Ct. Op. at App. B at 16a, Stip. ¶ 3. Henkel Corp. did business in all fifty states, including Minnesota, and various foreign countries during the taxable year in issue, which was the taxable year ending December 31, 1987.

## 4. Assessment of Minnesota Alternative Minimum Tax on Corporations.

In 1987, the Minnesota Legislature enacted the Minnesota Franchise Tax on Corporations tax structure, which is in issue in this case. Sup. Ct. Op. at App. A at 3a.

---

[1]All references to the Stipulation of Facts in this case are denominated "Stip." followed by a paragraph reference.

Minn. Stat. § 290.02 (1987 Supp.) created the basic framework for the corporate franchise tax structure as follows:

> An annual franchise tax on the exercise of the corporate franchise to engage in contacts with this state that produce gross income attributable to sources within this state is imposed upon every corporation that so exercises its franchise during the taxable year.
>
> * * * *
>
> The tax so imposed shall be measured by such corporations' taxable income and alternative minimum tax base for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

Pursuant to Minn. Stat. § 290.02, a corporation's total franchise tax liability for each year was measured by the corporation's taxable income *and* its alternative minimum tax base. Sup. Ct. Op. at App. A at 4a.

The part of the tax on a corporation's taxable income was calculated at the rate of 9.5% of taxable income pursuant to Minn. Stat. § 290.06, subd. 1 (1987 Supp.). Sup. Ct. Op. at App. A at 4a.

The part of the tax on a corporation's alternative minimum tax base was calculated at the rate of 1/10th of 1% of the alternative minimum tax base pursuant to Minn. Stat. § 290.092, subd. 1 (1987 Supp.). Sup. Ct. Op. at App. A at 4a. This part of the tax is colloquially referred to as the "AMT tax" or "Alternative Minimum Tax."

Minn. Stat. § 290.092, subd. 3 (1987 Supp.) defined the alternative minimum tax base for a corporate taxpayer as the "sum of: (1) the total amount of Minnesota sales or receipts;

(2) the amount of the taxpayer's total Minnesota property; and (3) the taxpayer's total Minnesota payrolls." Sup. Ct. Op. at App. A at 4a. Thus, the AMT tax considered three non-income "factors" in calculating a corporation's tax base. Sup. Ct. Op. at App. A at 4a.

Minn. Stat. §§ 290.02 and 290.092 ultimately required corporations to pay Minnesota franchise taxes equal to the *greater* of the factors-based 1/10th of 1% AMT tax *or* the taxable income based 9.5% tax. Sup. Ct. Op. at App. A at 4a-5a.

The Minnesota District Court noted that the enactment of the Minnesota Franchise Tax on Corporations tax structure, that imposed the greater of the AMT tax or 9.5% tax on corporations, was in "keeping with [Minnesota's] traditional leadership in the area of creative taxation [and placed Minnesota] alone among all taxing jurisdictions worldwide by having enacted a non-elective 'factors tax.'" Tr. Ct. Op. at App. B at 24a.

Fairway Foods and Henkel Corp. were subjected to the AMT tax for their taxable years ending December 31, 1987 because their factors based AMT taxes were greater than their taxable income based 9.5% taxes. Tr. Ct. Op. at App. B at 16a-17a, 22a, Stip. ¶¶ 5, 60.[2]

Fairway Foods and Henkel Corp. filed claims for refund with the Minnesota Department of Revenue seeking refunds of the factors-based AMT tax. Tr. Ct. Op. at App. B at 17a, 22a, Stip. ¶¶ 8, 65. The Minnesota Department of Revenue denied the claims for refund. Tr. Ct. Op. at App. B at 17a, 22a, Stip. ¶¶ 9, 66. Fairway Foods and Henkel Corp. filed actions in Minnesota District Court to recover the refunds.

---

[2]Fairway Foods was required to pay a factors-based AMT tax in the amount of $135,668 for the taxable year ending December 31, 1987. Tr. Ct. Op. at App. B at 22a, Stip. ¶ 61. Henkel Corporation was required to pay a factors-based AMT tax in the amount of $15,450 for the taxable year ending December 31, 1987. Tr. Ct. Op. at App. B at 17a, Stip. ¶ 6.

## 5. The Proceedings Below.

*How the federal questions were raised and passed on below.*

In their complaints, arguments to the court and briefs in the Ramsey County District Court, and in their briefs and arguments to the court in the Minnesota Supreme Court, Petitioners Fairway Foods and Henkel Corp. contended that the Minnesota Franchise Tax statutes which required corporations to pay taxes equal to the *greater* of the factors-based 1/10th of 1% AMT tax *or* the taxable income based 9.5% tax violated the Commerce Clause and Due Process and Equal Protection Clauses of the United States Constitution because the Minnesota tax structure violated the bright-line "internal consistency" requirement of the Commerce Clause. The Ramsey County District Court and Minnesota Supreme Court explicitly noted and ruled on Petitioners' Commerce Clause, Due Process and Equal Protection Clause objections. Tr. Ct. Op. at App. B at 30a-34a, Sup. Ct. Op. at App. A at 9a-10a, 11a.

*The decisions below.*

*Ramsey County District Court.* The Trial Court held that the Minnesota Franchise Tax measured by a combination of a corporation's taxable income and alternative minimum tax base does not lack "internal consistency." Tr. Ct. Op. at App. B at 32a. The Trial Court further stated that Petitioners' use of a mathematical model and a hypothetical corporation in an attempt to demonstrate a lack of internal consistency does not reach the level of "clear and cogent" evidence required by *Container Corporation of America v. Franchise Tax Board,* 463 U.S. at 169-70, 103 S.Ct. at 2942, 77 L.Ed.2d at 556. Tr. Ct. Op. at App. B at 32a.

The Trial Court misread the opinion of this Court in *Container Corporation of America.* The only reference to the "internal consistency" test in *Container Corporation of America* was in the context of this Court's statement that "an

apportionment formula must, under both the Due Process and Commerce Clauses, be fair." 463 U.S. at 169, 103 S.Ct. at 2942, 77 L.Ed.2d at 556.

This Court stated in this context that "[t]he first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency — that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business' income being taxed." *Id.* There is no discussion in this Court's opinion as to the type or kind of proof that is required to show a lack of "internal consistency." In fact, this Court made no further reference to the "internal consistency" test in its opinion. There was no argument advanced in *Container Corporation of America* that California's widely accepted three-factor apportionment formula lacked "internal consistency."

The opinion of this Court in *Container Corporation of America* was largely devoted to an analysis of "external consistency" which this Court states is "[t]he second and more difficult requirement" of fairness in an apportionment formula. *Id.* The reference by this Court to "clear and cogent" evidence was clearly in the context of the proof required to show a lack of "external consistency." 463 U.S. at 169-170, 103 S.Ct. at 2942, 77 L.Ed.2d at 556.

The attorney presenting the oral argument to the Minnesota Supreme Court on behalf of the State of Minnesota acknowledged in response to a question by the Supreme Court that the Trial Court's reliance on *Container Corporation of America* to determine the type or kind of proof that is required to show a lack of "internal consistency" was misplaced.

The opinion of the Trial Court should be summarily disregarded as irrelevant to the issues before this Court.

*Minnesota Supreme Court.* The Minnesota Supreme Court

affirmed the decision of the Ramsey County District Court. Sup. Ct. Op. at App. A at 14a.

The Supreme Court stated that "[b]ecause [Petitioners] have failed to establish that the AMT [tax] discriminated against interstate commerce or that it violated the Uniformity and Equal Protection Clauses, we affirm the district court's decision." Sup. Ct. Op. at App. A at 2a.

The Supreme Court recognized that "[a] determination of whether a particular state taxation scheme violates the Commerce Clause begins with the United States Supreme Court's decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977)." Sup. Ct. Op. at App. A at 7a.

The Supreme Court further recognized that "[w]ithin the Commerce Clause's fair apportionment framework lies the internal consistency test relied upon by [Petitioners] and first established by the Supreme Court in *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983)." Sup. Ct. Op. at App. A at 7a.

The Supreme Court then noted that in this Court's "most recent decision under this standard," *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ____, 115 S.Ct. 1331, 1338, 131 L.Ed2d 261, 271-72 (1995), this Court "explained the internal consistency mechanism" as follows:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as com-

> pared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

Sup. Ct. Op. at App. A at 8a.

The Supreme Court accurately noted that the parties in this case agree that the Minnesota Franchise Tax statutes in issue, which imposed a tax equal to the *greater* of the factors-based 1/10th of 1% AMT tax *or* the taxable income based 9.5% tax, must satisfy the bright-line internal consistency test as articulated by this Court in *Jefferson Lines, Inc.*, 514 U.S. __, 115 S.Ct. at 1338, 131 L.Ed.2d at 271-72; Sup. Ct. Op. at App. A at 8a.

The Supreme Court even acknowledged that Professor Wayne H. Richter, a mathematics professor at the University of Minnesota and Petitioners' expert witness at the trial of this case, "used mathematical formulae and graphs to *establish certain constitutional problems* with the AMT [tax] when applied to [a hypothetical corporation]." (Emphasis added.) Sup. Ct. Op. at App. A at 5a.

And this is the point where the Minnesota Supreme Court's analysis misses the "forest for the trees."

Professor Richter reduced the relevant Minnesota statutory provisions to mathematical form and developed a mathematical theorem which clearly shows that "[the] identical application [of the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base] by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate" as

directed by the United States Supreme Court in *Jefferson Lines, Inc.*[3] App. E—Mathematical Formulae at App. E at 55a-60a; App. F—Graphical Illustrations of Violation of Internal Consistency at App. F at 61a-62a.

Professor Richter's expert testimony and opinions were undisputed.

Professor Richter also testified without equivocation that the Minnesota Franchise Tax fails the "internal consistency" test regardless of the combinations and permutations of assumptions used in a given set of hypothetical circumstances for purposes of illustrating his mathematical formulae. Specifically, Professor Richter testified "[the exhibits used at trial to illustrate the violation of the internal consistency test by the Minnesota Franchise Tax] are simply illustrative of a general property, mainly that no matter what your corporation is, no matter what the structures of apportionment factors are, there will always be some interval determined by that structure of apportionment factors for which there will be a violation of internal consistency." Trial Transcript, p. 216, at App. D at 51a.

The mathematical formulae developed by Professor Richter effectively analyze every apportionment structure in the universe, including the apportionment structures of Petitioners

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[3]Professor Wayne H. Richter testified as follows that the identical application of the Minnesota Franchise Tax violated the internal consistency test:

> As soon as you have a situation where, *assuming that Minnesota's tax law is the law in every state*, assuming that you have at least one state in which the corporation pays the franchise tax measured by taxable income, and at least one state in which the corporation pays the franchise tax measured by the alternative minimum tax base, as soon as that happens you have one state in which one happens and one state in which the other happens, *you immediately have a situation where you have a violation of internal consistency. And this is what happens here.*

(Emphasis added.) Trial transcript, p. 312, at App.D at 53a.

Fairway Foods and Henkel Corp. In doing so, Professor Richter clearly showed that, for every possible apportionment structure, there exists a range of various levels of taxable income at which the Minnesota Franchise Tax results in higher overall tax liabilities for every taxpayer doing business in interstate commerce, including Petitioners Fairway Foods and Henkel Corp., as compared to taxpayers doing business wholly within the State of Minnesota, if it is assumed the Minnesota Franchise Tax measured by taxable income and the alternative minimum tax base is enacted by every State in the Union.

The Minnesota Supreme Court erroneously failed to focus on the dispositive proof of a violation of the bright-line internal consistency test demonstrated by Professor Richter's mathematical formulae. Instead, the Supreme Court focused solely on the single hypothetical X Corporation, which was used solely by Professor Richter to illustrate his mathematical formulae. The Supreme Court rendered its decision on the basis of the erroneous premise that the illustration of the mathematical formulae represented the only proof offered by Petitioners to show the violation of the internal consistency test.

The Minnesota Supreme Court summarized what it erroneously believed to be the sum and substance of the proof offered by Petitioners at footnote one of its opinion as follows:

> As noted above, [Petitioners'] fair aportionment argument is based upon a hypothetical "X Corporation" with certain income, sales, property and payroll amounts in Minnesota. If X Corporation has a net taxable income of $770,000 in Minnesota in one year, it will have an income-based franchise tax liability (based on a tax rate of 9.5%) of $73,150. This income tax must be compared, however, to X Corporation's alternative minimum tax liability to determine the actual franchise tax owed. Assuming X Cor-

> poration operates only within this state and has $11,000,000 in Minnesota sales, $58,200,000 in Minnesota property and $3,700,000 in Minnesota payroll, its AMT liability in Minnesota will be $72,900, or the sum of .001 times each factor. Because its income tax liability exceeds its AMT liability, X Corporation will owe the State the greater amount, or $73,150, in franchise taxes for that year. A different result is reached in certain financial situations, according to [Petitioners], if X Corporation operates in Minnesota and nine other states. Assuming that the AMT statutory scheme is employed by all states, X Corporation could be liable for up to $104,340 in franchise taxes, or 43% more than a wholly intrastate corporation with identical income and factor totals. This is because each individual state will compare X Corporation's income tax liability with its AMT liability and require X Corporation to pay the higher amount, resulting in a different total tax at certain levels of sales, property and payroll than an entirely intrastate corporation.

Sup. Ct. Op. at App. A at 5a-6a, fn. 1.

The Minnesota Supreme Court then erroneously restated Petitioners' argument. The Supreme Court erred when it focused solely on the hypothetical illustration involving X Corporation. The Supreme Court ignored Petitioners' uncontroverted evidence of the mathematical formulae that conclusively showed that the Minnesota Franchise Tax as measured by taxable income and the alternative minimum tax base will result in higher overall taxes in certain instances for all taxpayers doing business in interstate commerce as compared to intrastate commerce under the internal consistency test analysis. The Supreme Court wholly mischaracterized the Petitioners' argument by stating "[i]n short, [Petitioners]

argue that the theoretical assumption required by the [United States Supreme Court's] internal consistency test should be extended one step further to permit the use of an entirely theoretical plaintiff.'' Sup. Ct. Op. at App. A at 9a.

The Minnesota Supreme Court then upheld the constitutionality of the Minnesota Franchise Tax measured by taxable income and the alternative minimum tax base stating as follows:

> [Petitioners] have shown no existing taxpayer with the same financial circumstances as X Corporation, and none of the representative plaintiffs' tax situations reveal a similar constitutional violation. [fn omitted]. Therefore, we find that the trial court properly rejected the testimony of [Petitioners'] mathematical expert and gave his legal conclusions no special weight.

Sup. Ct. Op. at App. A at 10a.

## REASONS FOR GRANTING THE WRIT

The decision of the Minnesota Supreme Court warrants review by this Court for three compelling reasons. First, the decision of the Minnesota Supreme Court incorrectly blurs the bright-line internal consistency test under the Commerce Clause first established by this Court in *Container Corporation of America* and most recently addressed by this Court in *Jefferson Lines, Inc.* Second, the question raised by this case is a recurring issue of profound national significance that must be considered by states and other taxing jurisdictions every time they enact a new tax structure which imposes a tax on corporations doing business in interstate commerce. Third, the Minnesota Supreme Court's decision on the application of the bright-line internal consistency test is incompatible with

prior decisions of this Court and, if left undisturbed, would undermine one of the most straightforward and basic constitutional constraints on state taxation and would encourage further aggressive unconstitutional taxation.

## I. THE DECISION OF THE MINNESOTA SUPREME COURT INCORRECTLY BLURS THE BRIGHT-LINE INTERNAL CONSISTENCY TEST UNDER THE COMMERCE CLAUSE ESTABLISHED BY THIS COURT.

This Court has consistently emphasized the importance of "bright-line" tests under the Commerce Clause, such as the "physical presence" test for purposes of determining whether a State may compel a vendor to collect a sales or use tax established by this Court in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753, 758, 87 S.Ct. 1389, 1392, 18 L.Ed.2d 505, 509-10 (1967) and reaffirmed in *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S.Ct. 1904, 1912, 119 L.Ed.2d 91, 106 (1992).

The bright-line internal consistency test under the Commerce Clause is a clear rule that provides "precise guides" to States and businesses to determine whether a tax structure has the unconstitutional capability of imposing an additional burden of taxation on interstate commerce that intrastate commerce would not also bear.

The internal consistency test simply requires that a state tax structure have an inherent mathematical symmetry so that there exists no possibility that "its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines, Inc.*,514 U.S. __, 115 S.Ct. at 1338, 131 L.Ed.2d at 271-72.

The internal consistency test is simple, it is straightforward. An analysis of a tax structure using the internal consistency test can be undertaken by anyone with an understanding of high school algebra. The internal consistency test simply requires the tax structure to operate in a fashion so that the overall tax burdens for interstate commerce will not add up to more than those for intrastate commerce.

This Court discussed the benefits of "clear rules" in the context of the Commerce Clause in *Quill Corp.*, as follows:

> Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes and reduces litigation concerning those taxes. This benefit is important, for as we have so frequently noted, our law in this area is something of a "quagmire" and the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458 (1959).
>
> Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by businesses and individuals. [fn omitted]. Indeed, it is not unlikely that the mail-order industry's dramatic growth over the last quarter-century is due in part to the bright-line exemption from state taxation created in *Bellas Hess*.

504 U.S. at 315-316, 112 S.Ct. at 1915, 119 L.Ed.2d at 108-09.

The attorney representing the State of Minnesota argued to the Minnesota Supreme Court that, if the Supreme Court adopted Petitioners' interpretation of the internal consistency test, it would be abdicating this "weighty" constitutional determination to math professors and any other business person with an understanding of high school algebra.

But this is exactly the benefit which is intended to result from a clear rule or bright-line test. *See, e.g., Quill Corp.*, 504 U.S. __, 112 S.Ct. at 1915, 119 L.Ed. 2d at 108-09. The bright-line internal consistency test is intended to, ***and does in fact***, provide "precise guides" so that businesses and individuals can easily determine whether a tax structure violates the internal consistency test. The bright-line internal consistency test obviates the need for this Court or any other court to make these determinations on a case-by-case basis.

The State of Minnesota could have easily modified the Minnesota Franchise Tax on Corporations tax structure so that it would satisfy the internal consistency test by simply (i) subjecting corporations to ***both*** the part of the tax measured by taxable income and the part of the tax measured by the alternative minimum tax base instead of the greater of the two, or (ii) providing for a credit for equivalent out-of-state taxes incurred by interstate businesses. Either of these modifications would have provided the Minnesota tax structure with the inherent mathematical symmetry necessary to preclude the possibility of a higher overall tax burden on interstate commerce as compared to intrastate commerce. Minnesota declined to modify the tax structure to satisfy the test.

The Expert Opinion of Professor Wayne H. Richter (Pl. Ex. No. 16, App. G at 63a-77a) and the illustrations involving X Corporation (Pl. Ex. Nos. 21, 22, 23, 24, 25, App. H at 78a-92a) clearly show that the Minnesota Franchise Tax

measured by a corporation's taxable income and alternative minimum tax base imposed a greater burden of tax on corporations doing business within and without Minnesota in interstate commerce than on corporations doing business wholly within Minnesota when it is assumed that the Minnesota Franchise Tax is imposed by every other State in the United States.

The Expert Opinion and testimony of Professor Wayne H. Richter are undisputed. Nothing in the record of this matter contradicts Professor Richter's opinion. The undisputed showing by the Petitioners is that the imposition of a tax identical to the Minnesota Franchise Tax in issue by every other State in the United States adds an additional burden on interstate commerce that is not borne by a corporation doing business wholly within Minnesota.

That, therefore, is the end of the inquiry. The Minnesota Franchise Tax in issue is unconstitutional as a matter of law.

## II. THE QUESTION DECIDED BY THE MINNESOTA SUPREME COURT IS A RECURRING ISSUE OF PROFOUND NATIONAL SIGNIFICANCE THAT MUST BE CONSIDERED BY STATES AND OTHER TAXING JURISDICTIONS EVERY TIME THEY ENACT A NEW TAX STRUCTURE THAT IMPOSES A TAX ON CORPORATIONS DOING BUSINESS IN INTERSTATE COMMERCE AND IF THE DECISION BELOW IS LEFT UNDISTURBED IT WILL PRECLUDE THE SIMPLE APPLICATION OF THE BRIGHT-LINE INTERNAL CONSISTENCY TEST.

The decision of the Minnesota Supreme Court warrants this Court's review in its own right because if it is left undisturbed it will preclude the simple application of the bright-line inter-

nal consistency test established by this Court and allow other courts to require taxpayers to show something more than simply that the tax structure in issue has the capability to result in overall higher tax burdens for interstate commerce than for intrastate commerce.

The decision of the Minnesota Supreme Court not only requires a taxpayer to show that a challenged tax structure lacks the inherent mathematical symmetry to satisfy the internal consistency test, but the decision creates an additional burden of proof to show that the actual plaintiff in the case is in fact presently adversely affected by the lack of internal consistency without providing any "precise guides" as to exactly how a taxpayer is supposed to satisfy this additional burden of proof.

The decision of the Minnesota Supreme Court takes the bright-line internal consistency test with its precise guides and jettisons it back into a "quagmire" where the "application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides." *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 457-458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421, 426-27 (1959).

The relentless and continuous enactment of tax legislation affecting interstate commerce by the states and the myriad of other taxing jurisdictions within each state makes it imperative for this Court to retrieve the internal consistency test from the "quagmire" and restore it to its former position in the light of the bright day sun where everyone, including math professors and business persons, knew what the internal consistency test was.

## III. THE DECISION OF THE MINNESOTA SUPREME COURT CONFLICTS WITH THE DECISIONS OF THIS COURT THAT HAVE HELD A TAXPAYER CAN PROVE A STATE TAX STRUCTURE FAILS THE INTERNAL CONSISTENCY REQUIREMENT OF THE COMMERCE CLAUSE MERELY BY SHOWING HYPOTHETICALLY THAT THE TAX STRUCTURE CAN RESULT IN HIGHER OVERALL TAX LIABILITIES FOR TAXPAYERS DOING BUSINESS IN INTERSTATE COMMERCE AS COMPARED TO TAXPAYERS DOING BUSINESS WHOLLY WITHIN THE STATE.

No court has held that, in order for a taxpayer to show the absence of "internal consistency" under the Commerce Clause, the taxpayer must prove that the lack of internal symmetry in the tax structure results in individualistic, discriminatory taxation against that taxpayer on the basis of that taxpayer's present "tax situation."Such a holding is unheard of and is entirely at odds with this Court's interpretation of the Commerce Clause. Yet, the Minnesota Supreme Court held precisely that. Sup. Ct. Op. at App. A at 10a. The Minnesota Supreme Court's holding as to the burden of proof required by the internal consistency test would mean the constitutionality of any tax structure on any given day will now depend upon the individual "tax situation" of every taxpayer determined on a case by case basis.

A tax structure is either unconstitutional or not under the bright-line internal consistency test of the Commerce Clause. The determination is not intended to be dependent upon the "tax situation" of every individual taxpayer.

To the contrary, both this Court and all of the other courts which have addressed the issue have uniformly held the "internal consistency" test has nothing to do with the *actual* interaction of the tax structure in issue with the tax structure of other states or with the "tax situation" of the taxpayer. *Jefferson Lines Inc.*, 514 U.S. ____, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). A taxpayer is not required to prove anything by clear and cogent evidence or by any other evidentiary standard relative to the actual interaction of various state tax structures with its "tax situation." The application of the "internal consistency" test is purely hypothetical. *Jefferson Lines, Inc.*, 514 U.S. __, 115 S.Ct. at 1338, 131 L.Ed.2d at 271; *Goldberg v Sweet*, 488 U.S. 252, 261, 109 S.Ct. 582, 589, 102 L.Ed.2d 607, 617 (1989); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 284, 107 S.Ct. 2829, 2840, 97 L.Ed.2d 226, 243 (1987); *Tyler Pipe Industries*, 483 U.S. at 242, 107 S.Ct. at 2817, 97 L.Ed.2d at 210; *Armco*, 467 U.S. at 644, 104 S.Ct. at 2623, 81 L.Ed.2d at 546.

This Court emphasized the purely hypothetical nature of the "internal consistency" test in *Jefferson Lines, Inc.* as follows:

> This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

514 U.S. __, 115 S.Ct. at 1338, 131 L.Ed.2d at 271.

As this Court stated in *Armco:*

> [The State Tax Commissioner of West Virginia] suggests that we should require Armco to prove *actual discriminatory* impact on it by pointing to a State that imposes a manufacturing tax that results in a total

> burden higher than that imposed on Armco's competitors in West Virginia. *This is not the test.*
>
> * * *
>
> Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes in 49 other States, and that the validity of the taxes imposed on each taxpayer would depend on the particular other States in which it operated. [footnote omitted].

467 U.S. at 644-45; 104 S.Ct. at 2623-24, 81 L.Ed.2d at 546-47. (Emphasis added.)

Once it has been shown the imposition of a tax identical to the one in question by every other State adds an additional burden on interstate commerce that is not borne by commerce wholly within a single State imposing the tax in question, the tax in question is unconstitutional as a matter of law.

This Court described this "litmus" test in *Jefferson Lines, Inc.* as follows:

> A failure of internal consistency *shows as a matter of law* that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax. [citations omitted].

514 U.S. ____, 115 S.Ct. at 1338, 131 L.Ed.2d at 271. (Emphasis added.)

The mathematical formulae introduced by Professor Richter show the tax structure in issue lacks internal consistency. Petitioners are not required to prove anything other than this to prevail.

Other courts have also consistently struck down tax structures as unconstitutional which have been shown on the basis of a hypothetical analysis to violate the bright-line internal consistency test. *See, e.g., General Motors Corporation v. City of Los Angeles*, 35 Cal. App. 4th 1736, 1744, 42 Cal.Rptr.2d 430, 434 (1995); *Sprint Communications Company v. Sharon Pratt Kelly*, 642 A.2d 106, 116 (D.C.), *cert. denied*, 130 L.Ed.2d 208 (1994); *Barringer v. Griffes*, 1 F.3d 1331,1336 (2d Cir. 1993); *Department of Revenue v. Kuhnlein*, 646 So.2d 717, 724 (Fla. 1994).

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A

## IN SUPREME COURT

**C2-95-1588**
**C5-95-1715**

Ramsey County — Keith, C.J.

In re Alternative Minimum Tax Refund Cases.

Filed: April 12,1996
Office of Appellate Courts

## SYLLABUS

1. The Alternative Minimum Corporate Franchise Tax, Minn. Stat. §§ 290.02, 290.092 (1987), was not "internally inconsistent" and did not discriminate against interstate commerce under the Commerce Clause of the United States Constitution.

2. Taxpayers' use of a hypothetical corporation to show a lack of "internal consistency" did not demonstrate a Commerce Clause violation beyond a reasonable doubt.

3. The Alternative Minimum Corporate Franchise Tax did not create an unconstitutional classification of corporate taxpayers, and therefore did not violate the Uniformity Clause of the Minnesota Constitution.

Affirmed.

Heard, considered and decided by the court en banc.

## OPINION

KEITH, Chief Justice.

On appeal from a judgment of the Ramsey County District Court, three corporations doing business in Minnesota raise state and federal constitutional challenges to a unique corporate franchise taxation scheme in effect in Minnesota between 1987 and 1989. Appellants argue that the Alternative Minimum Corporate Franchise Tax ("AMT"), embodied in Minn. Stat. §§ 290.02, 290.092 (1987), violated the Commerce Clause of the United States Constitution because it was "internally inconsistent" and discriminated against interstate commerce. Appellants also contend that the AMT created an unconstitutional classification of corporate taxpayers in violation of the Uniformity Clause of the Minnesota Constitution and the Equal Protection Clause of the United States Constitution. After a three-day trial in which appellants presented these claims, the district court rejected all of appellants' contentions and upheld the constitutionality of the AMT. Upon a successful petition by the State for accelerated review of the district court's findings, appellants renew their constitutional objections before this court. Because appellants have failed to establish that the AMT discriminated against interstate commerce or that it violated the Uniformity and Equal Protection Clauses, we affirm the district court's decision.

### I.

During the mid-1980's, Minnesota had one of the highest corporate income tax rates in the United States: 12%. This tax level gave Minnesota a reputation as an "anti-business" state, which caused considerable concern among business, executive and legislative leaders. Furthermore, under the existing system approximately half of all corporations operating in Minnesota actually paid no income tax in a given year

because there was no "minimum" corporate tax. Corporations that showed no taxable profits were not liable for corporate income taxes, even though they owned property in Minnesota, had Minnesota employees and sold substantial amounts of goods and services in the state. All of these factors contributed to a movement in 1987 to reform the corporate tax system in Minnesota by lowering the overall corporate income tax rate and by broadening the corporate tax base. This would permit the state to both maintain adequate tax revenue and change its high-tax "anti-business" reputation.

The new corporate minimum tax established by the legislature in 1987 is the subject of this challenge by appellants. This particular form of "alternative minimum tax" was only in effect from 1987 to 1989, and has since been replaced by a corporate alternative minimum tax based on the federal tax code. *See,* Min. State § 290.0921 (1994).

Minnesota Statutes section 290.02 (1987) created the basic framework for the corporate franchise taxation scheme:

> An annual franchise tax on the exercise of the corporate franchise to engage in contacts with this state that produce gross income attributable to sources within this state is imposed upon every corporation that so exercises its franchise during the taxable year.
>
> * * * *
>
> The tax so imposed shall be measured by such corporation's taxable income and alternative minimum tax base for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

*Id.* Under this statute, a corporation's total franchise tax liability for each year was measured by the corporation's taxable income *and* its alternative minimum tax base. The corporate income tax was calculated at a rate of 9.5% under Minn. Stat. § 290.06, subd. 1 (1987), but only that income apportionable to Minnesota was taxed. Minn. Stat. § 290.191, subd. 1 (1987).

The AMT, however, was not based upon corporate income. It was premised upon the notion that businesses with low profits or only losses should still contribute to public finances by paying a tax proportionate to their "business activities" within the state. Thus, the AMT considered three non-income "factors" in calculating a corporation's tax base. Section 290.092 defined the alternative minimum tax base for a corporate taxpayer as the "sum of: (1) the total amount of Minnesota sales or receipts; (2) the amount of the taxpayer's total Minnesota property; and (3) the taxpayer's total Minnesota payrolls." Minn. Stat. § 290.092, subd. 3 (1987). Accordingly, the total franchise tax imposed upon corporations in Minnesota included "a tax equal to the excess, if any, of: (1) .001 multiplied by the alternative minimum tax base, over (2) the amount of tax computed under this chapter without regard to this section." Minn. Stat. § 290.092, subd. 1 (1987). This method ensured that a low profit corporation would not escape franchise taxation in Minnesota. If the corporation did not pay income tax because its profits were insufficient, it was still required to pay the AMT at a rate of .001 times its total Minnesota sales, property and payroll. And, as the district court explained, "[t]hose corporations whose franchise tax measured by taxable income, computed by multiplying 9.5% times their Minnesota taxable income, exceeded the AMT also paid the additional amount by which the franchise tax measured by taxable income exceeded the alternative minimum tax." Ultimately, corporations paid total franchise taxes equal to the

*greater* of the factors-based AMT *or* the income-based 9.5% tax.

In October of 1992, a number of corporations with business operations in Minnesota filed a consolidated complaint in Ramsey County challenging the AMT on constitutional grounds and seeking a refund of excess franchise taxes paid. Each of the refund claimants paid alternative minimum taxes in excess of their regular corporate franchise income taxes between 1987 and 1989, and then unsuccessfully sought a refund of the AMT from the Minnesota Department of Revenue. Three of the original claimants, Fairway Foods, Inc., Henkel Corporation, and Juba's, Inc., were designated as representative plaintiffs for purposes of determining liability.

A three-day trial was held in Ramsey County District Court on March 1-3, 1995. Appellants presented testimony from several expert witnesses. An attorney from an accounting firm worked through the tax returns of the three representative plaintiffs, showing how the total franchise tax liability was calculated for each corporation. He also explained how a hypothetical "X Corporation" designed by appellants could pay significantly more franchise taxes under the AMT if it operated inside and outside of Minnesota than it would pay operating solely inside the state. In addition, a mathematics professor at the University of Minnesota used mathematical formulae and graphs to establish certain constitutional problems with the AMT when applied to X Corporation.[1]

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[1]As noted above, appellants' fair apportionment argument is based upon a hypothetical "X Corporation" with certain income, sales, property and payroll amounts in Minnesota. If X Corporation has a net taxable income of $770,000 in Minnesota in one year, it will have an income-based franchise tax liability (based on a tax rate of 9.5%) of $73,150. This income tax must be compared, however, to X Corporation's alternative minimum tax liability to determine the actual franchise tax owed. Assuming X Corporation operates only within this state and has $11,000,000 in Minnesota

Following the trial, the district court rejected all of appellant's constitutional arguments and upheld the validity of the AMT. The district court found that the AMT did not impose an unlawful burden on interstate commerce, an additional tax, nor an unlawful classification of taxpayers under the state and federal constitutions. The court disagreed with appellants' contention that the tax violated the "internal consistency test" applied by the United States Supreme Court in *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983), and *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, ____ U.S. ____, 115 S.Ct. 131, 1337 (1995). The court determined that appellants' use of a mathematical model and a hypothetical corporation did not establish a violation of this internal consistency principle, and corporate taxpayers in general were not exposed to a risk of multiple taxation by the AMT. Furthermore, the court found that the "credit" granted to corporations subject to the AMT for any Minnesota corporate income tax paid did not discriminate against interstate commerce by penalizing those corporations operating outside the state. Instead, this credit was simply "the arithmetic operation necessary to insure that a corporation pays the higher of the two possible franchise taxes."

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sales, $58,200,000 in Minnesota property and $3,700,000 in Minnesota payroll, its AMT liability in Minnesota will be $72,900, or the sum of .001 times each factor. Because its income tax liability exceeds its AMT liability, X Corporation will owe the State the greater amount, or $73,150, in franchise taxes for that year. A different result is reached in certain financial situations, according to appellants, if X Corporation operates in Minnesota and nine other states. Assuming that the AMT statutory scheme is employed by all states, X Corporation could be liable for up to $104,340 in franchise taxes, or 43% more than a wholly intrastate corporation with identical income and factor totals. This is because each individual state will compare X Corporation's income tax liability with its AMT liability and require X Corporation to pay the higher amount, resulting in a different total tax at certain levels of sales, property and payroll than an entirely intrastate corporation.

## II.

A determination of whether a particular state taxation scheme violates the Commerce Clause begins with the United States Supreme Court's decision in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). In that case, the Court set forth a four-prong test which will sustain a state tax affecting interstate commerce if: "[1] [the tax] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Id.* at 279. Appellants' challenge to the AMT is based upon the second and third prongs of this test. Appellants have not contested the district court's conclusions that the business activities taxes are sufficiently connected to Minnesota and that the tax relates to public services provided by Minnesota, thus satisfying the first and fourth prongs of the *Complete Auto* standard.

The second prong, which requires a state tax to be "fairly apportioned," provides one basis for appellants' claim that the AMT is unconstitutional. Within the Commerce Clause's fair apportionment framework lies the internal consistency test relied upon by appellants and first established by the Supreme Court in *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983). In *Container*, the Court observed that the Due Process and Commerce Clauses require each state to be fair when apportioning a corporation's income to determine how much income can be taxed by that state. *Id.* This fairness in apportionment of income requires both "internal" and "external" consistency in order to survive constitutional scrutiny. To be internally consistent, an apportionment formula must, "if applied by every jurisdiction, * * * result in no more than all of the unitary business' income being taxed." *Id.* And to be externally consistent, the same apportionment formula

"must actually reflect a reasonable sense of how income is generated." *Id.* Thus, the requirement of fair apportionment ensures that "each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989).

In its most recent decision under this standard, the Supreme Court explained the internal consistency mechanism:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

*Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, ____ U.S. ____, 115 S.Ct. 1331, 1338 (1995). The parties in this case agree that the internal consistency test was correctly summarized by the district court in this case. Their dispute focuses on the application of this standard to the AMT and the district court's conclusion that "[p]laintiffs' use of a mathematical model and a hypothetical corporation in an attempt to demonstrate a lack of internal consistency does not reach the level of 'clear and cogent' evidence required by *Container, supra*, at 170."

Appellants' arguments at trial and on appeal rely heavily upon their mathematical proof of the alleged constitutional violations inherent in the alternative minimum tax scheme. According to appellants, once a *potential* variation is established between interstate and intrastate tax liability, the tax scheme violates the internal consistency test under the Commerce Clause and therefore must be struck down. The fact that X Corporation is purely hypothetical does not undermine the conclusiveness of their proof of a violation, appellants argue, since the internal consistency test itself is hypothetical in nature. As the Supreme Court has stated, the internal consistency test "asks nothing about the degree of economic reality reflected by the tax" since it requires a theoretical assumption that every state imposes the same type of tax. *Jefferson Lines*, 115 S.Ct. at 1338. In short, appellants argue that the theoretical assumption required by the Court's internal consistency test should be extended one step further to permit the use of an entirely theoretical plaintiff.

The State disputes this conclusion, arguing that any internal consistency under the AMT cannot be established beyond a reasonable doubt by the use of a hypothetical corporate taxpayer. *See In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989) (statutes are presumed constitutional, and constitutional violations must be proven beyond a reasonable doubt). The State maintains that appellants cannot employ an imaginary corporation to prove that the AMT places inconsistent tax burdens upon interstate and intrastate commerce. We agree. Appellants correctly observe that the internal consistency test involves the hypothetical imposition of the same tax by every state. But what is objectionable is appellants' use of a hypothetical plaintiff, X Corporation, to establish a violation of this principle.

The State notes that the Supreme Court has never found a violation of internal consistency by relying upon "the exist-

ence of a purely hypothetical taxpayer with a specific structure of factors and taxable income, to justify striking down a tax law which was not facially discriminatory." Despite appellants' insistence that their case is quite similar to several decisions by the Supreme Court, in each of those cases real taxpayers could have suffered discriminatory taxation if the challenged tax scheme was adopted by every state. *See, e.g., Armco, Inc. v. Hardesty*, 467 U.S. 638, 644 (1984); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987). Appellants have shown no existing taxpayer with the same financial circumstances as X Corporation, and none of the representative plaintiffs' tax situations reveal a similar constitutional violation.[2] Therefore, we find that the trial court properly rejected the testimony of appellants' mathematical expert and gave his legal conclusions no special weight.

## III.

Appellants raise two other arguments on appeal. First, appellants contend that the AMT discriminated against interstate commerce, a violation of the third prong of the *Complete Auto* test, because it granted a "credit" to those corporations that paid corporate income taxes to Minnesota, but denied this credit to corporations that paid income taxes to other states. *See* Minn. Stat. § 290.092, subd. 1 (1987) (AMT owed by corporations equals the excess of .001 times the alternative minimum tax base over the regular income-based franchise

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[2]In fact, the hypothetical corporation employed by appellants requires a very unusual combination of circumstances to demonstrate any violation at all. The State notes that X Corporation has an unusually low rate of investment return (1.3%) when compared to the average return in even a low profit margin industry, such as wholesale foods (10.7%). Furthermore, if X Corporation's rate of investment return increased to just 3.1%, still a very low rate, no violation of internal consistency would occur.

tax). Therefore, appellants argue, wholly intrastate corporations received preferential treatment under the AMT as compared to interstate corporations. We note, however, that there is no constitutional requirement of a credit for corporate taxes paid to other states.[3] The credit of which appellants complain was simply a mathematical means of ensuring that corporations operating in Minnesota paid *either* the ordinary income-based tax *or* the AMT, whichever was greater. Furthermore, all franchise taxes on corporate income, sales, property and payroll were apportioned to the corporation's Minnesota activities without regard to corporate domicile. Thus, appellants have failed to establish that the AMT scheme granted preferential treatment to intrastate businesses at the expense of interstate commerce.

Finally, appellants maintain that the AMT violated the Uniformity Clause of the Minnesota Constitution by creating an unconstitutional classification of corporate taxpayers, and by imposing an additional tax on Minnesota business activities which are already subject to income, real property and unemployment compensation taxes. The Uniformity Clause requires, in pertinent part, that "[t]axes shall be uniform upon the same class of subjects." Minn. Const. art. X, § 1. This provision

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[3]Appellants point to Justice Souter's comments in *Jefferson Lines* in support of their contention that a credit for franchise taxes paid to other states is required under the Commerce Clause. *See* 115 S.Ct. at 1342 n.6. But appellants take Justice Souter's statements out of context. The Supreme Court's decision in *Jefferson Lines* concerned a sales tax levied on all interstate bus tickets sold in Oklahoma. *Id.* at 1335. In upholding Oklahoma's sales tax scheme, Justice Souter, writing for the majority, noted that the Court had never upheld a tax that provide credits for payments of in-state taxes, but denied such credits for payments of equivalent taxes paid to other states. This comment, however, was in reference to sales/use tax schemes which compensate states for sales taxes lost when resident taxpayers purchase goods in foreign states and then transport them into the home state. The AMT is not comparable to the paired or compensating taxation schemes at issue in *Jefferson Lines*; therefore appellants' reliance on that case is misplaced.

is no more restrictive upon the legislature's taxing power than the Equal Protection Clause of the Fourteenth Amendment. As this court has stated, "[i]f the statute here involved does not violate one, it does not violate the other." *Elwell v. Hennepin County*, 301 Minn. 63, 75, 221 N.W.2d 538, 546 (1974).

Minnesota courts apply a three-factor rational basis test to determine the constitutionality of statutory classifications:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is, there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

*Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979). The district court rejected appellants' arguments that the AMT created an unconstitutional classification of corporate taxpayers. The court explained that all corporations are liable for a total franchise tax based on the same Minnesota factors, without regard to a corporation's ability to pay. It further concluded that "any classifications that may exist are genuine and relevant to the purpose of the law and not arbitrary or fanciful."

In their challenge to the district court's conclusion, appellants assert that the AMT is not a uniform tax because it is only imposed upon those corporations with profits insufficient to avoid its application. Nonetheless, we find that the district court's findings were correct: under the rational basis standard set forth in *Miller Brewing* and the Uniformity Clause,

the AMT was not an unconstitutional tax. The State correctly notes that the standard of proof faced by appellants is a considerable barrier to victory in this court. Legislative tax classifications are granted additional deference under the Uniformity Clause, and will be struck down only when absolutely necessary. *Guilliams v. Commissioner of Revenue*, 299 N.W.2d 138, 142 (Minn. 1980); *Miller Brewing, supra*, at 356. Any classifications created by the AMT must be considered in light of its legislative purpose, which the State defines as "to impose a measure of tax upon corporations which elect to exercise their corporate franchises in Minnesota in a given year."

First, even if the AMT created separate classes of corporate taxpayers, this was a "genuine and substantial" distinction intended to make corporations without significant profits share the burden of supporting public services in Minnesota. *Miller Brewing*, 284 N.W.2d at 356. Second, the purpose of the AMT was to broaden the corporate franchise tax base. This was reasonably accomplished by the enactment of a new minimum franchise tax applicable to all corporations operating in Minnesota. And third, the purpose of the AMT was legitimately addressed by the legislature. By enacting the new tax scheme, the legislature could require that all corporations, no matter how profitable, contribute to public services and share the corporate tax burden. Furthermore, the AMT was intended to reduce the unpredictability of the solely income-based franchise tax system and increase tax revenues, two indisputably valid legislative goals. In short, the AMT was not an arbitrary or irrational legislative enactment.

Appellants further assert that the AMT constitutes an additional tax on Minnesota factors which are already subject to income, real property and unemployment compensation taxes. Corporations contribute to the public coffers through other types of state taxes, argue appellants, and should not be

subjected to an additional franchise tax which most likely exceeds the cost of any public services received. We disagree. The AMT was not an income tax, but a distinctly different tax intended to exact a minimum amount of financial support from corporations that used Minnesota's public services in the course of their business. Therefore, appellants' contention that the AMT imposed an additional tax upon income and corporate sales, payroll and property mischaracterizes the legal basis for the imposition of the AMT. The fact that the AMT considered a corporation's Minnesota sales, property and payroll in calculating the franchise tax owed does not mean that the legislature levied an additional sales, property and income tax on only certain corporations, nor that it has violated the rational basis test established by this court in *Miller Brewing*. Thus, appellants' final contentions are without merit.

The district court's decision is affirmed.

## APPENDIX B

**STATE OF MINNESOTA**
**DISTRICT COURT**
**COUNTY OF RAMSEY**
**SECOND JUDICIAL DISTRICT**

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**IN RE ALTERNATE MINIMUM TAX REFUND CASES.**

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**Court File No: C1-92-9775**
**and ALL CASES**

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## FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER FOR JUDGMENT

This matter was tried before the Honorable M. Michael Monahan, District Court, on 1-3 March 1995 without a jury. The parties requested, and were granted, additional time to obtain a transcript and to make post-trial submissions. Those submissions were made on 1 May 1995.

Joe A. Walters of O'Connor & Hannan appeared for plaintiffs.

Barry R. Greller and Gregory P. Huwe, Assistant Minnesota Attorneys General, appeared for defendants.

There are 101 cases pending in this district seeking refunds of the Minnesota Alternate Minimum Tax on Corporations (the "AMT"). See Minn.Stat. §§ 290.02 & 290.092 (1987). The administration of these actions was divided into two phases: (1) liability; and (2) remedial. A consolidated complaint was served and filed in order to streamline the determination of the common liability issues. On 30 June 1993, Count 14 of the consolidated complaint (the "1983 Claim") was dismissed for

failing to state a claim upon which relief could be granted. This order embodies the results of the trial of the liability phase. The plaintiffs in *Fairway Foods, Inc. v. McClung* (CX-92-4736), *Henkel Corporation v. McClung* (C1-92-4737), and *Juba's Inc. v. McClung* (C0-90-12212) served as representative plaintiffs. The trial encompassed plaintiffs' constitutional challenges to the AMT. It did not include a determination of what effect, if any, Section 306(a) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. §11503 (1988) or Section 31(a) (1) of the Federal Motor Carrier Act, 40 U.S.C. § 11503(a) (1988) might have on the constitutionality of the AMT. The results of the liability trial, once final, will be binding in all cases.

Based on the parties stipulation, the testimony and documentary evidence, and the arguments of counsel, the court makes the following:

## FINDINGS OF FACT

A. *Henkel Corporation.*

1. Henkel Corporation ("Henkel") is a Delaware corporation.

2. Henkel's principal place of business is 2200 Renaissance Boulevard, Suite 200, Gulph Mills, Pennsylvania.

3. Henkel is engaged primarily in the business of manufacturing chemicals.

4. Henkel filed its Minnesota Corporate Income Tax Return (Form M-4) for its taxable year ended 31 December 1987 in accordance with the provisions of Minn.Stat. § 290.01, *et. seq.*, (1987).

5. Henkel's tentative AMT liability determined at line 4 of Schedule AMT on page 2 of its 1987 Form M-4 exceeded

Henkel's corporate franchise tax measured by taxable income computed at line 17 of Form M-4. Accordingly, Henkel was subjected to the AMT pursuant to Minn.Stat. §§ 290.02 and 290.092 (1987).

6. Through corporate estimated payments, payments with properly filed extensions, or payments made along with its Form M-4, Henkel paid a fully computed franchise tax measured by the alternative minimum tax base of $15,450.

7. The franchise tax imposed by Minn. Stat. § 290.02 (1987) and measured by Henkel's taxable income for its taxable year ending 31 December 1987 was computed pursuant to Minn. Stat. § 290.06, subd. 1 (1987) by multiplying the rate of 9.5% times its Minnesota taxable income. There was no corporation franchise tax measured by taxable income imposed upon Henkel for the taxable year ending 31 December 1987.

8. On or about 30 September 1991, Henkel timely and properly filed a claim for refund with the Department seeking a refund of Minnesota franchise tax measured by the alternative minimum tax base for the taxable year ended 31 December 1987, in the amount of $15,450, plus accrued interest and penalties, if any.

9. On or about 2 December 1991, Henkel received written notice from the Department that Henkel's refund claim had been denied in its entirety.

10. On 20 April 1992, Henkel filed an action in this Court to recover the refunds. The action was brought within 18 months of the denial of the refund claim by the Department.

11. The Minnesota franchise tax on corporations imposed upon Henkel by Minn. Stat. § 290.092 (1987) included a tax measured by its alternative minimum tax base for its taxable year ended 31 December 1987.

12. The average tangible property valued at original cost owned by Henkel and located in Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota property as shown on Henkel's 1987 Form M-4, was $407,148.

13. The net annual rents paid by Henkel for the use of real property located in Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota property, times a multiplier of eight, as shown on Henkel's 1987 Form M-4, was $6,144,840.

14. The total compensation paid by Henkel to employees employed within or actually engaged in work within Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota payrolls as shown on Henkel's 1987 Form M-4, was $3,437,933.

15. The total sales made by Henkel in Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota sales as shown on Henkel's 1987 Form M-4, was $5,460,442.

16. Henkel's commercial domicile for its taxable year ending 31 December 1987 was Pennsylvania.

17. Henkel did business partly within and partly without Minnesota during its taxable year ending 31 December 1987.

18. The Minnesota taxable income of Henkel for its taxable year ending 31 December 1987 would have had to have equalled or exceeded $162,632 for Henkel to avoid the imposition of the AMT.

20. The combined apportionable income of the unitary group, which includes Henkel, for the taxable year ending 31 December 1987 would have had to have been more than $5,031,930 for Henkel to avoid the imposition of the AMT.

B. *Juba's Inc.*

1. Juba's, Inc. ("Juba") is a Minnesota corporation.

2. Juba's principal place of business is Highway 71/23 and Harrison Garage Road, Willmar, Minnesota.

3. Juba is engaged primarily in the business of operating retail grocery supermarkets.

4. Juba employed 256 individuals in Minnesota during the period 1 February 1987 to 31 January 1988.

5. Juba timely filed its Minnesota Corporate Income Tax Return (Form M-4) for its taxable year ended 31 January 1988 in accordance with the provisions of Minn.Stat. § 290.01, *et seq.* (1987).

6. Juba's tentative AMT liability determined at line 4 of Schedule AMT on page 2 of its 1987 Form M-4 exceeded Juba's corporate franchise tax measured by taxable income computed at line 17 of Form M-4. Accordingly, Juba was subjected to the AMT pursuant to Minn.Stat. §§ 290.02 and 290.092 (1987).

7. Through corporate estimated payments, payments with properly filed extensions, or payments made along with its Form M-4, Juba paid a fully computed franchise tax measured by the alternative minimum tax base of $23,276.

8. Juba's Minnesota taxable income determined at line 16 of its 1987 Form M-4 was $70,633.

9. Juba's total Minnesota corporation tax determined at line 18 of its 1987 Form M-4 was $29,986.

10. The franchise tax imposed by Minn. Stat. § 290.02 (1987) and measured by Juba's taxable income for its taxable year ending 31 January 1988, was computed pursuant to Minn. Stat. § 290.06, subd. 1 (1987) by multiplying the rate of 9.5% times its Minnesota taxable income.

11. On or about 27 June 1989, Juba timely and properly filed a claim for refund with the Department seeking a refund of Minnesota franchise tax measured by the alternative minimum tax base for the taxable year ended 31 January 1988, in the amount of $23,276, plus accrued interest and penalties, if any.

12. On or about 25 September 1989, Juba received written notice from the Department that Juba's refund claim had been denied in its entirety.

13. On 24 October 1990, Juba filed an action in this Court to recover the refund. The action was brought within 18 months of the denial of the refund claim by the Department.

14. The Minnesota franchise tax on corporations imposed upon Juba by Minn. Stat. § 290.02 (1987) included a tax measured by its alternative minimum tax base for its taxable year ended 31 January 1988.

15. The average tangible property valued at original cost which was owned by Juba and located in Minnesota during the period 1 February 1987 to 31 January 1988, and included in Minnesota property as shown on Juba's 1987 Form M-4, was $2,468,052.

16. The net annual rents paid by Juba for the use of real property located in Minnesota during the period 1 February 1987 to 31 January 1988, times a multiplier of eight, as shown on Juba's 1987 Form M-4, was $1,931,848.

17. The total compensation paid by Juba to employees employed within or actually engaged in work within Minnesota during the period 1 February 1987 to 31 January 1988, and included in Minnesota payrolls as shown on Juba's 1987 Form M-4, was $12,226,287.

18. The total sales made by Juba in Minnesota during the period 1 February 1987 to 31 January 1988, and included in Minnesota sales as shown on Juba's 1987 Form M-4, was $23,360,054.

19. Juba's commercial domicile for its taxable year ending 31 January 1988 was Minnesota.

20. Juba did business wholly within Minnesota during its taxable year ending 31 January 1988.

21. The $23,276 AMT paid by Juba for its taxable year ending 31 January 1988 was 32.95% of its Minnesota taxable income.

22. The total Minnesota corporation tax paid by Juba for its taxable year ending 31 January 1988 in the amount of $29,986 represented 42.45% of its Minnesota taxable income.

23. The Minnesota taxable income of Juba for its taxable year ending 31 January 1988 would have had to have equalled more $315,642, in order for Juba to avoid the imposition of the AMT.

C. *Fairway Foods, Inc.*

1. Fairway Foods, Inc. ("Fairway") is a Minnesota corporation.

2. Fairway's principal place of business is 4567 West 80th Street, Minneapolis, Minnesota.

3. Fairway is engaged primarily in the wholesale grocery business.

4. Fairway timely filed its Minnesota Corporate Income Tax Return (Form M-4) for its taxable year ended 31 December 1987 in accordance with the provisions of Minn.Stat. § 290.01, *et seq.* (1987).

5. Fairway's tentative AMT liability determined at line 4 of Schedule AMT on page 2 of its 1987 Form M-4 exceeded Fairway's corporate franchise tax measured by taxable income computed at line 17 of Form M-4. Accordingly, Fairway was subjected to the AMT pursuant to Minn.Stat. §§ 290.02 and 290.092 (1987).

6. Through corporate estimated payments, payments with properly filed extensions, or payments made along with its Form M-4, Fairway paid a fully computed franchise tax measured by the alternative minimum tax base of $135,668.

7. Fairway's Minnesota taxable income determined at Line 16 of its 1987 Form M-4 was $599,930.

8. Fairway's total Minnesota corporation franchise tax determined at line 19 of its 1987 Form M-4 was $192,662.

9. The franchise tax imposed by Minn. Stat. § 290.02 (1987) and measured by Fairway's taxable income for its taxable year ending 31 December 1987 was computed pursuant to Minn. Stat. § 290.06, subd. 1 (1987) by multiplying the rate of 9.5% times its Minnesota taxable income.

10. On or about 28 October 1991, Fairway timely and properly filed a claim for refund with the Department seeking a refund of Minnesota franchise tax measured by the alternative minimum tax base for the taxable year ended 31 December 1987, in the amount of $135,668, plus accrued interest and penalties, if any.

11. On or about 2 December 1991, Fairway received written notice from the Department that Fairway's refund claim had been denied in its entirety.

12. On 20 April 1992, Fairway filed an action in this Court to recover the refunds. The action was brought within 18 months of the denial of the refund claim.

13. The Minnesota franchise tax on corporations imposed upon Fairway by Minn. Stat. § 290.02 (Supp. 1987) included a tax measured by its alternative minimum tax base for its taxable year ended 31 December 1987.

14. The average tangible property valued at original cost which was owned by Fairway and located in Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota property as shown on Fairway's 1987 Form M-4, was $30,721,444.

15. The net annual rents paid by Fairway for the use of real property located in Minnesota during the period 1 January 1987 to 31 December 1987, times a multiplier of eight, as shown on Fairway's 1987 Form M-4, was $254,104.

16. The total compensation paid by Fairway to employees employed within or actually engaged in work within Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota payrolls as shown on Fairway's 1987 Form M-4, was $8,946,781.

17. The total sales made by Fairway in Minnesota during the period 1 January 1987 to 31 December 1987, and included in Minnesota sales as shown on Fairway's 1987 Form M-4, was $152,739,222.

18. Fairway's commercial domicile for its taxable year ending 31 December 1987 was Minnesota.

19. Fairway did business partly within and partly without Minnesota during its taxable year ending 31 December 1987.

20. The $135,668 AMT paid by Fairway for its taxable year ending 31 December 1987 was 22.61% of its Minnesota taxable income.

21. The total Minnesota corporation tax paid by Fairway for its taxable year ending 31 December 1987 of $192,662 represented 32.11% of its Minnesota taxable income.

22. The Minnesota taxable income of Fairway for its taxable year ending 31 December 1987 would have had to have equalled or exceeded $2,028,021 in order for Fairway to avoid the imposition of the AMT.

23. The combined apportionable income of the unitary group, which includes Fairway as a member, for the taxable year ending 31 December 1987, would have had to have equalled more than $12,526,380 in order for Fairway to avoid the imposition of the AMT.

D. *Adoption of AMT.*

1. Prior to 1987, Minnesota imposed a franchise tax on corporations equal to 12% of taxable Minnesota income. This was one of the highest, if not the highest, corporate tax rate in the nation.

2. The pre-1987 corporate franchise tax was one of the most, if not the most, volatile of taxes because of its sensitivity to the economic cycle and because of its structure. Revenues were unpredictable in amount and availability.

3. In 1987, Minnesota had one of the highest tax rates in a number of areas, including the corporate franchise tax, leading to unfavorable business climate comparisons between Minnesota and other states.

4. In 1987, the franchise tax was amended. Those amendments give rise to these actions.

5. In keeping with its traditional leadership in the area of creative taxation, Minnesota stands alone among all taxing jurisdictions worldwide by having enacted a non-elective "factors tax". This unique approach to taxing businesses was not

based on net income or profits. It was based on the notion that a tax on business activities would force low profit and loss businesses to contribute to the public coffers.

6. The practical result of the 1987 amendments was that the Minnesota franchise tax was imposed on a corporation's Minnesota taxable income or on its "alternative minimum tax base", whichever generated the higher tax. The "alternative minimum tax base" consisted of three factors, the corporation's Minnesota sales, Minnesota property, and Minnesota payroll.

7. The 1987 amendments were the result of a study by the Governor's Tax Policy Group (the "Group"), consisting of officials in the Governor's Office, and the Departments of Revenue, Finance, State Planning, and Energy and Economic Development. The Group proposed major tax reforms including, *inter alia*, a reduction in the corporate franchise tax rate from 12% to 8.9%, the adoption of a minimum tax on business activities within the state, the elimination of net operating loss carry-backs, repeal of the arithmetic apportionment option, and conformance to federal corporate tax amendments.

8. The 1987 changes were intended to expand the corporate tax base, to add fairness by increasing the number of corporations paying business taxes, to simplify the corporate tax, to generate additional revenues, to add stability and predictability to the corporate tax revenues, to reduce the burden on highly-taxed businesses, and to remove Minnesota from the ranks of the highest ranking corporate tax rates states.

9. The AMT proposed by the Group was conceived of as a tax on business activity occurring in Minnesota, as measured by three factors: Minnesota property, Minnesota payroll, and Minnesota sales. These factors were used because they are:

(a) broad, neutral measures of business activity; (b) readily available; and (c) easy to use. The three factors recommended as the AMT tax base were also chosen because they were neutral, indifferent to profit, did not penalize profitable corporations, and taxed on a fair and equitable basis.

10. A major premise behind the adoption of the AMT was that income alone was not the best basis for taxing business, because it is only one measure of activity and because it discriminates against businesses that are profitable.

11. Before adoption of the AMT, approximately one half of the corporations doing business in Minnesota and subject to tax paid any corporate franchise tax in a given year. The AMT was conceived of as a nondiscriminatory, broad-based, tax which all corporations engaging in business activity in Minnesota would pay to support public services.

12. In 1987, the Department of Revenue estimated that about 7,000 of the most heavily taxed Minnesota corporations would receive a net tax reduction of around $60 million a year under the proposed corporate tax reforms and that more non-Minnesota corporations would be required to pay a franchise tax. The Legislature was aware of these estimates when it considered adoption of the AMT.

13. Both the Group and the Legislature heard and considered a wide variety of testimony and input from taxpayers and others concerning the 1987 changes of the corporate franchise tax structure.

14. The Legislature adopted the AMT substantially as proposed by the Group as part of the Omnibus Tax Bill for 1987. Act of 28 May 1987, ch. 268, art. 1, § 54, 1987 Minn. Laws 1081-82.

15. The AMT was a part of a more general overhaul of the corporate tax scheme: (a) to reduce the corporate tax rate; (b) to broaden the reach of the franchise tax; (c) to add stability and predictability corporate tax collects; and (d) to increase corporate tax revenues.

16. The reduction in the stated franchise tax rate was a public relations subterfuge designed to permit the state to claim it no longer had the highest corporate tax rate in the nation. In order to achieve this and the other goals described above without adversely affecting state revenues, both the franchise tax base and the universe of taxpayers had to be broadened to make up for the revenue lost by the rate reduction.

E. *Issues Presented.*

1. The consolidated compliant contains a broad attack on the constitutionality of the AMT.

2. In their post-trial brief, plaintiffs state that the issues for decision are:

a. Whether the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base violates the Interstate Commerce Clause and Due Process and Equal Protection Clauses of the United States Constitution when the statutory provisions violate the "internal consistency" requirement of the Interstate Commerce Clause.

b. Whether the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base violates the Interstate Commerce Clause and Due Process and Equal Protection Clauses of the United States Constitution when the statutory provisions discriminate against corporations doing business within and without Minnesota

and whose property and payroll are located outside Minnesota when compared to similarly situated corporations doing business wholly within Minnesota because the statutory provisions fail to provide for credits for equivalent out-of-state franchise taxes measured by taxable income paid by corporations doing business in interstate commerce to other states.

c. Whether the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base violates the Uniformity Clause and Due Process and Equal Protection Clauses of the Minnesota Constitution when the statutory provisions result in the imposition of additional sales, property, and payroll taxes upon some but not all members of the same class of taxpayers.

d. Whether the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base violates the Uniformity Clause and Due Process and Equal Protection Clauses of the Minnesota Constitution when the statutory provisions result in arbitrary and unreasonable classifications of taxpayers which in turn results in the imposition of higher tax rates and denial of certain tax exemptions for one class of taxpayers.

e. Whether the Minnesota Franchise Tax measured by a corporation's taxable income and alternative minimum tax base violates the Uniformity Clause and Due Process and Equal Protection Clauses of the Minnesota Constitution when the statutory provisions result in the imposition of different rates of tax upon the same amounts of Minnesota net taxable income.

F. *Legislative Purpose & Effect of AMT.*

1. The Legislature did not intend to discriminate against out-of-state corporations by enacting the AMT. Rather, the intent was to more effectively and efficiently tax all corporations doing business in Minnesota.

2. Under the AMT as enacted, all corporations subject to tax in Minnesota were required to pay at least a minimum tax computed by multiplying 1/10th of one percent times the alternative minimum tax base of Minnesota property, Minnesota payroll and Minnesota sales. Those corporations whose franchise tax measured by taxable income, computed by multiplying 9.5% times their Minnesota taxable income, exceeded the AMT also paid the additional amount by which the franchise tax measured by taxable income exceeded the alternative minimum tax.

3. The net result of these tangled computations was that a corporation paid a franchise tax equal to the greater of the franchise tax determined on the factors basis or the franchise tax determined on income.

4. The purposes articulated by the Group in its report and recommendations to the Legislature with regard to the AMT are valid public purposes.

5. In adopting the AMT in 1987, the Legislature rationally viewed it as furthering the purposes set forth in the Group's recommendations.

6. The AMT was rationally related to the valid public purpose of insuring that all corporations engaging in business activity in Minnesota contributed to the funding of public services regardless of whether they were profitable.

7. The AMT was rationally related to the valid public purpose of distributing tax burdens across all corporations according to the benefits they received from public services.

8. The AMT was rationally related to the valid public purpose of reducing volatility and increasing predictability of tax revenues.

9 The economic impact of the AMT was to reduce the variation in tax rates and thus the differential impact of corporate taxes on groups of firms.

10. The AMT tax burden was not intended to be, and was not in practice, based on profits. No meaningfully constitutional analysis of the AMT can be premised on taxpayers' profit levels.

11. Imposition of the AMT does not result in more than 100 percent of some firms' income being taxed.

12. If all states were to adopt and impose a franchise tax identical to that in effect in Minnesota during 1987, no corporation would be subject to duplicative or multiple taxation.

13. The AMT does not irrationally or arbitrarily classify taxpayers on the basis of profits, gross receipts, location of their businesses, or any other unreasonable basis.

14. The AMT as enacted by the Legislature does not constitute an arbitrary or unreasonable "surtax" on sales, property and payroll of corporations doing business in Minnesota.

## CONCLUSIONS OF LAW

*1. Internal Consistency & Discrimination Against Interstate Commerce.*

The imposition of the AMT on plaintiffs does not constitute an unlawful burden on interstate commerce in violation of the rights guaranteed plaintiffs by the Commerce Clause of the United States Constitution. The United States Supreme Court has grafted onto the Commerce Clause's expressed grant of

authority to Congress a negative command known as the "dormant" Commerce Clause. The dormant Commerce Clause prohibits certain state taxation even when Congress has failed to legislate on the subject. *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992). We are told that the purpose of the dormant Commerce Clause is to prevent a state from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to impose burdens on the flow of commerce across its borders that commerce within its borders would not bear. *See Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 7 (1986).

After a good deal of analytical meandering over the years, the United States Supreme Court has declared itself prepared to sustain a tax against a Commerce Clause challenge when the tax: (a) is applied to an activity with a substantial nexus to the taxing state; (b) is fairly apportioned; (c) does not discriminatory against interstate commerce; and (d) is fairly related to the services provided by the taxing State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)("Complete"). Since this decision, the Court has applied and refined its four part test a number of times. *See, e.g., Goldberg v. Sweet*, 488 U.S. 252 (1989)("*Goldberg*"); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988); *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983) ("*Container*"); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The most recent case is *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, _____ U.S. _____, 115 S.Ct. 1331 (1995)("*Jefferson*").

A. Applying the first prong of the *Complete* test here, there is a sufficient nexus between Minnesota and the three plaintiffs' activities to support the imposition of the Minnesota franchise tax on them. Indeed, plaintiffs do not argue otherwise. All the plaintiffs do business in Minnesota.

B. The second aspect of the *Complete* test requires that a tax be fairly allocated between intrastate and interstate commerce. In determining the apportionment question, a court must determine if the tax is "internally consistent" and, if so, whether it is also "externally consistent". *Jefferson, supra.* at 1338 (1995).

i. A tax meets the internal consistency test when the imposition of an *identical* tax by every other state adds no burden to interstate commerce not also borne by intrastate commerce. The test looks to the structure of the tax to see whether its identical application by every State would place interstate commerce at a disadvantage as compared with intrastate commerce. The test does not address economic reality, it is a facial test. If a tax fails the internal consistency test, then as a matter of law, the taxing state is attempting to take more than its fair share of taxes from interstate commerce.

The claim that the AMT lacks internal consistency is plaintiffs' main challenge here. The combination of the Minnesota income based franchise tax and the Minnesota AMT based franchise tax does not lack "internal consistency". Neither aspect of the franchise tax, that imposed on Minnesota income nor the franchise tax based on Minnesota factors, exposes those tax bases to a risk of taxation in more than one state. Plaintiffs' use of a mathematical model and a hypothetical corporation in an attempt to demonstrate a lack of internal consistency does not reach the level of "clear and cogent" evidence required by *Container, supra.* at 170.

ii. A tax is extremely consistent if the state's claim upon the value taxed is fairly attributable to activities within that state. *See Goldberg, supra.* at 262; *Container, supra.* at 169-170. In this case, Minnesota taxes Minnesota income as well as Minnesota sales, property, and payrolls. Plaintiffs do not challenge the allocation of income to Minnesota and do

not challenge the method adopted by Minnesota for determining what constitutes Minnesota sales, Minnesota property, and Minnesota payrolls. The AMT is externally consistent because the values being taxed are fairly apportioned to Minnesota.

C. Plaintiffs' discrimination argument turns on the use of credits in divining the amount of the franchise tax to be paid. Plaintiffs argue that the franchise tax based on AMT factors discriminates against interstate commerce because it allows a credit against a corporation's franchise tax computed on its AMT factors for its Minnesota franchise tax computed on its Minnesota income but does not allow a credit for non-Minnesota franchise taxes that may be computed on non-Minnesota income. Quoting plaintiffs:

> A corporation doing business within and without Minnesota, with property and payroll located outside Minnesota, is only allowed to reduce its franchise taxes paid measured by the alternative minimum tax base by the regular taxes paid measured by taxable income on the profits deemed to be attributable to its marketing efforts in Minnesota. No credit is allowed for franchise taxes paid to other states on profits attributable to employees and capital employed in the business [outside Minnesota] which are related to the sales in Minnesota. The result is to accord preferential treatment to corporations doing business wholly within Minnesota.

This argument is an attempt to mold the case to fit Justice Souter's footnote observation that: "We have indeed never upheld a tax in the face of a substantiated charge that it provided credits for taxpayer's payment of in-state taxes but failed to extend such credit to payments of equivalent out-of-state taxes". *Jefferson* at 1342, fn. 6.

There is no constitutional requirement for a credit for non-Minnesota franchise taxes. The Minnesota franchise tax does not purport to tax non-Minnesota activities. It does not tax the same "transaction" that may be subject to tax by another state. The mere fact that Minnesota allows a "credit"[1] against the AMT based franchise tax for its income based franchise tax does not expose a corporation to the possibility that some other state will impose a franchise tax on the corporation's Minnesota sales, Minnesota property, or Minnesota payroll. There is no discriminatory motive in the Minnesota's credit provisions and that provision does not create any pressure for a corporation to shift assets to Minnesota. Thus, there is no discrimination against interstate commerce.

D. The AMT is related to the public services provided by Minnesota. As indicated above, the AMT based franchise tax was designed and intended to tax corporations based on their level of presence within Minnesota. In addition to income, the State selected three other indices of business activity, sales, property, and payroll. Because all four factors are Minnesota specific, they are rationally related to the level public services provided by Minnesota.

2. *Additional Tax.*

The imposition of the Minnesota alternative minimum tax on corporation's pursuant to Minn. Stat. § 290.092 as in effect for the taxable years in issue does not constitute a *de facto* additional sales, property, and payroll tax upon some but not all members of the same class of taxpayers.

The AMT contains no specific classification of taxpayers. Rather, it requires that all corporate taxpayers pay a tax based

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[1]Properly considered this "credit" is the arithmetic operation necessary to insure that a corporation pays the higher of the two possible franchise taxes.

on their Minnesota factors and that those corporations with the ability to pay more because of their income level also pay based on their Minnesota income. The practical implementation of this tax scheme and the calculations required to be made in order to compute the taxes do not mutate a franchise tax into an additional tax on sales, property, or payroll.

3. *Classification of Taxpayers.*

The Minnesota AMT does not result in an arbitrary and irrational classification of taxpayers in violation of the Minnesota Uniformity Clause, art. X, sec. 1, the Due Process and Equal Protection Clauses of the Minnesota Constitution and Fourteenth Amendment to the United States Constitution[2]. The problem plaintiffs perceive is that the franchise tax does not classify corporate taxpayers on their ability to pay.

The franchise tax is a flat tax and, like so many other Minnesota taxes, has nothing to do with ability to pay. Assuming that the franchise tax does have some aspect of classification as plaintiffs suggest, the test is whether there is any legislative purpose for the classification and any reasonable grounds to support the classification. *Erie Mining Company v. Commissioner of Revenue*, 343 N.W.2d 261, 268 (Minn. 1984). The record here supports the conclusion that any classifications that may exist are genuine and relevant to the purpose of the law and not arbitrary or fanciful. *Id.* at 268-69. All that needs to be said on this point is that courts apply the rational basis test to challenged economic classifications and are especially deferential to the Legislature when considering complex tax

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[2]Assumedly, this is not one of those constitutional areas in which the Minnesota Constitution affords Minnesota citizens greater protections than those afforded to all citizens by the United States Constitution. *Contra, Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828, 835-37 (Minn. 1991).

laws. *Nelson Office Supply Stores, Inc. v. Commissioner of Revenue*, 508 N.W.2d 776, 779 (Minn. 1993). Following that approach here, the statute must be sustained.

4. *Different Tax Rates.*

The Minnesota AMT does not result in the imposition of different rates of tax upon the same amounts of Minnesota net taxable income. Plaintiffs mistake the nature of the tax at issue here. It is a franchise tax, not an income tax. *Reuben L. Anderson-Cherne, Inc. v. Commissioner of Revenue*, 303 Minn. 124, 130, 226 N.W.2d 611, 615, *app. dismissed* 423 U.S. 886 (1975). Having mischaracterized the nature of the tax involved, plaintiffs go on to argue that it imposes different tax rate on the same classes of income. But, their evidence shows, not different income tax rates, but different franchise tax liability. The Minnesota franchise tax rate is a flat 9.5% on income and 0.1% on the three factors. Thus, corporations with the same income, sales, property, and payrolls are all taxed alike. Differences in tax liability between corporations stem from the differences in their respective tax bases, not different rates.

5. *Gross Receipts Tax.*

In the consolidated complaint, plaintiffs' assert this claim, but plaintiffs' post-trial brief does not address the issue. Accordingly, plaintiffs have abandoned the claim. To the extent that they have not abandoned it, the imposition of the Minnesota AMT is not an impermissible, irrational gross receipts tax in violation of the Uniformity Clause of Article X, Section 1 of the Minnesota Constitution and the Equal Protection Clauses of the Minnesota Constitution and the Fourteenth Amendment to the United States Constitution.

6. *Application of Tax.*

In the consolidated complaint, plaintiffs' assert this claim, but plaintiffs' post-trial brief does not address the issue. Accordingly, plaintiffs have abandoned the claim. To the extent that they have not abandoned it, the exclusions and exemptions included in the AMT statutory provisions, as well as the exemption of certain corporations from application of Minnesota's AMT, does not result in the tax being applied to corporations in an arbitrary and irrational manner, and does not violate the Uniformity Clause of Article X, Section 1 of the Minnesota Constitution, the Equal Protection Clauses of the Minnesota Constitution and Fourteenth Amendment to the United States Constitution or the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution.

7. *Delegation of Authority.*

In his opening statement, plaintiffs' counsel stated that plaintiffs persisted in this claim, but plaintiffs' post-trial brief does not address the issue. Accordingly, plaintiffs have abandoned the claim. To the extent that they have not abandoned it, plaintiffs lack standing to pursue this issue. Further the provision has never been implemented and has been repealed. 1990 Minn.Laws § 494. Finally, assuming that the provision delegating the authority to designate the rate for corporate franchise tax to the Minnesota Commissioner of Revenue, Minn. Stat. § 290.06, subd. 1 (b), violates the prohibition against delegation of the power of taxation in Article X, Section 1 of the Minnesota Constitution, it is severable from the rest of the statute. Minn.Stat. § 645.20.

8. *Section 1983.*

To the extent that plaintiffs' section 1983 claim survived the court's prior order dismissing that claim, plaintiffs have not been deprived of rights, privileges and immunities secured

by the United States Constitution and federal laws in violation of 42 U.S.C. § 1983.

9. *Refund.*

Plaintiffs are not entitled to refunds of the alternative minimum tax, plus interest and penalties, if any, claimed in their respective claims for refund, or to payment of costs and attorneys fees.

Based upon the above findings of fact and conclusions of law, the Court makes the following:

## ORDER

**IT IS HEREBY ORDERED, that:**

1. Plaintiffs' refund claims are hereby denied and their complaints, with the exception of the claims of certain plaintiffs based on Section 306(a) of the Railroad Revitalization and Regulatory Reform Act, 49 U.S.C. § 11503 (1988) and Section 31(a)(1) of the Federal Motor Carriers Act, 40 U.S.C. § 11503(a) (1988), are hereby dismissed with prejudice.

2. Defendants be, and hereby are, awarded their statutory costs and disbursements.

3. There is no just cause to delay the entry of this partial judgment.

4. The automatic stay imposed by Minn.Gen.R.Prac. 125 is vacated.

**LET JUDGMENT BE ENTERED ACCORDINGLY WITHOUT STAY.**

Dated: ____ June 1995

M. Michael Monahan
District Court Judge

# APPENDIX C

## Minn. Stat. § 290.02 (Supp. 1987)

290.02 FRANCHISE TAX ON CORPORATIONS MEASURED BY NET INCOME.

An annual franchise tax on the exercise of the corporate franchise to engage in contacts with this state that produce gross income attributable to sources within this state is imposed upon every corporation that so exercises its franchise during the taxable year.

Contacts within this state do not include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters that are made international for navigation purposes by any treaty or agreement to which the United States is a party.

The tax so imposed shall be measured by such corporations' taxable income and alternative minimum tax base for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

## Minn. Stat. § 290.06

290.06 RATES OF TAX; CREDITS AGAINST TAX.

Subdivision 1. **Computation, corporations.** (a) The franchise tax imposed by this chapter upon corporations shall be computed by applying to their taxable income the rate of 9.5 percent adjusted as provided in paragraph (b).

(b) For taxable years beginning after December 31, 1989, the commissioner of revenue must adjust the rate provided in paragraph (a) as provided in this paragraph. By December 15, 1989, the commissioner shall prepare a forecast of revenues predicted to be raised for taxable years beginning in 1990 by the franchise tax on corporations under this chapter for taxable years beginning in 1990, including the tax under section 290.092, computed as if the tax were imposed under section 290.092, subdivisions 1 to 4, and the rate in effect in this subdivision were 9.5 percent. The commissioner shall adjust the rate provided in paragraph (a) so that the amount forecast to be raised by the franchise tax on corporations under this chapter, including the tax under section 290.092, subdivision 5, is equal to the amount of the forecast computed as if the tax under section 290.092, subdivisions 1 to 4, were in effect.

## Minn. Stat. § 290.092 (Supp. 1987)

290.092 ALTERNATIVE MINIMUM TAX FOR CORPORATIONS.

Subdivision 1. **Imposition of tax.** For taxable years beginning after December 31, 1986, and before January 1, 1990, in addition to the taxes computed under this chapter without regard to this section, the franchise tax imposed on corporations includes a tax equal to the excess, if any, of:

(1) .001 multiplied by the alternative minimum tax base, over

(2) the amount of tax computed under this chapter without regard to this section.

Subd. 2. **Exemptions.** Corporations subject to tax under sections 290.05, subdivisions 3; or 60A.15, subdivision 1 and 290.35; real estate investment trusts; regulated investment companies; cooperatives taxable under subchapter T of the Internal Revenue Code of 1986 or organized under Chapter 308 or a similar law of another state; and entities having a valid election in effect under section 1362 or 860D(b) of the Internal Revenue Code of 1986, as amended through December 31, 1986, are not subject to the tax imposed in subdivision 1 or subdivision 5.

Subd. 3. **Alternative minimum tax base.** The alternative minimum tax base equals the sum of:

(1) the total amount of Minnesota sales and receipts;

(2) the amount of the taxpayer's total Minnesota property; and

(3) the taxpayer's total Minnesota payrolls;

less the exemption amount, if any.

Subd. 4. **Definitions.** (a) Minnesota sales and receipts'' means the total sales apportioned to Minnesota pursuant to section 290.191, subdivision 5, the total receipts attributed to Minnesota pursuant to section 290.191, subdivisions 6 to 8, and/or the total sales or receipts apportioned or attributed to Minnesota pursuant to any other apportionment formula applicable to the taxpayer.

(b) ''Minnesota property'' means total Minnesota tangible property as provided in section 290.191, subdivisions 9 to 11, and any other tangible property located in Minnesota. Intangible property shall not be included in Minnesota property for purposes of this section. Taxpayers who do not utilize tangible property to apportion income shall nevertheless include Minnesota property for purposes of this section. For the first five taxable years during which a corporation is subject to taxation under this chapter, the amount of its Minnesota property and payrolls shall be deemed to be zero for purposes of this section.

(c) ''Minnesota payrolls'' means total Minnesota payrolls as provided in section 290.191, subdivision 12. Taxpayers who do not utilize payrolls to apportion income shall nevertheless include Minnesota payrolls for purposes of this section.

(d) The ''exemption amount'' equals the lesser of (1) the sum of the taxpayer's Minnesota sales and receipts, property, and payrolls or (2) $5,000,000 reduced by one-half of the amount of the taxpayer's total sales and receipts, property, and payrolls in excess of $10,000,000. Total sales and receipts, property and payroll means the total determined under section 290.191 as the denominator of the apportionment formula. In the case of a unitary business, the amount must reflect the factors of the entire unitary business as reported on the combined report. A corporation that has as its sole or primary business activity (1) the providing of professional services;

(2) operation as a financial institution; (3) sales or management of real estate; or (4) operation as an insurance agency does not have an exemption amount.

Subd. 5. **Imposition of tax after 1989.** For taxable years beginning after December 31, 1989, in addition to the taxes computed under this chapter without regard to this section, the franchise tax imposed on corporations includes a tax equal to the excess, if any, of:

(1) 40 percent of the tax imposed upon the corporation under section 55(a) of the Internal Revenue Code of 1986, as amended through December 31, 1986, apportioned to Minnesota under section 290.191. In computing the amount of the liability under section 55(a) of the Internal Revenue Code of 1986, the regular federal tax liability under section 55(a)(2) of the Internal Revenue Code of 1986, must be determined using federal taxable income as modified by sections 290.01, subdivisions 19c and 19d, 290.095, and 290.21, and alternative minimum taxable income under section 56 of the Internal Revenue Code of 1986 must be computed as if the section 290.095 restrictions on net operating losses applied.

(2) the amount of tax computed under this chapter without regard to this section.

Subd. 6. **Credits.** In computing the tax under this section, the following credits are allowed:

(1) the enterprise zone credits allowed by section 273.1314, subdivision 9;

(2) the credits for estimated taxes paid; and

(3) the research and development credit allowed by section 290.068.

## APPENDIX D

**STATE OF MINNESOTA**
**DISTRICT COURT**
**COUNTY OF RAMSEY**
**SECOND JUDICIAL DISTRICT**

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**File No. C1-92-9775**

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IN RE ALTERNATIVE MINIMUM
TAX REFUND CASES.

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## TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for trial before M. MICHAEL MONAHAN, Judge of District Court, on March 1, 1995. The Plaintiffs were represented by their attorneys, Joe A. Walters of O'Connor and Hannan, 706 South Second Avenue, 700 Baker Building, Minneapolis, Minnesota 55402 and Mark S. Anderson of Hillstrom, Bale, Anderson, Polstein, Pearson & Hill, 607 Marquette Avenue, Suite 400, Minneapolis, Minnesota 55402-1796. The Defendants were represented by their attorneys, Barry R. Greller and Gregory P. Huwe, Assistants Attorney General Tax Litigation Division, 10 River Park Plaza, St. Paul, Minnesota 55146-0600.

Robert A. Erdmann
Court Reporter
1510 Courthouse
St. Paul, MN 55102

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[215]
********that.

MR. WALTERS: Does it — Does Definition No. 6 work into your theorem?

THE WITNESS: I don't need to have that definition there to use it there.

MR. WALTERS: All right. I'm willing to strike that.

THE COURT: With respect to Exhibit 16, then, the admission is with respect to everything except Definition No. 6. With respect to Exhibit 17, the admission is to everything except Definition 6 and now includes Definition 9. Now why we're doing all that is totally beyond me since all of that stuff is in 16.

MR. WALTERS: You're right, Your Honor. Just to tidy up the record, Your Honor.

BY MR. WALTERS (Continuing):

Q Now, would you take a look at Exhibit No. 19 and Exhibit 21. Am I reading the numbers right?

A That's right.

Q Do your graphs that you have here represent only one combination of the assumptions and whether this internal violation — internal consistency with other combinations and assumptions?

[216]
A Okay. This — The graph was determined by — Exhibit No. 19 was determined by the information in Exhibit No. 21. So in Exhibit No. 21 that shows the structure of apportionment factors and from that this graph was produced. Now, if someone were to change the figures on Exhibit 21 by changing certain levels of sales, property or payroll in one or more of those states, or if in fact one

even added additional states with their own levels of sales, property and payroll, the graph would change. So the graph would change as those figures changed. But no matter what you put in Exhibit 21, there will always be a Qmin and a Qmax determined by the numbers that would appear in the new Exhibit 21 and that — those numbers Qmin and Qmax would determine an interval such that within that interval any income in that interval would be be a violation of internal consistency as I have defined it. So this Exhibit No. 19 and 21 are simply illustrative of a general property, mainly that no matter what your corporation is, no matter what the structures of apportionment factors are, there will always be some interval determined by that structure of apportionment factors for which there will be a violation of internal consistency.

There is one mathematical exception to that statement.
[217] And that is the case where each of the Qi's, that is Q1, Q2, Q3 as they are defined in Definition 11, if each of those turn out to be identical to each other, then there is no interval. But that's a mathematical possibility that's remote in the real world.

Q. So with an interval of internal — the interval of violation in internal consistency will prevail throughout between the minimum and maximum?

A. That's right. As you change the structures of apportionment factors in Exhibit 21, the interval might get smaller, it might get larger. The graph — The difference between the tax T, assuming each state has Minnesota law, and the T internal, the tax assuming the entire business is within Minnesota, the difference between those may change but it will still be there.

MR. WALTERS: That's all of my direct examination of Professor Richter.

THE COURT: Cross?

*CROSS-EXAMINATION*

BY MR. GRELLER:

Q Professor, do you have Plaintiffs' Exhibit 16 before you? That's your report?

[311] We are still dealing with Y Corporation, and the structure of apportionment factors that is given in Exhibit 47 is used to calculate the franchise tax measured by taxable income, and the franchise tax measured by alternative minimum tax base in each of these ten states.

MR. WALTERS: I offer Exhibit 48.

THE COURT: For illustrative purposes it will be received, absent objection.

MR. GRELLER: No objection, Your Honor.

BY MR. WALTERS (Continuing):

Q All right. Now, would you please tell us what this exhibit shows?

A Well, this is another example where there is a violation of internal consistency for the following reason. If you look at the State of Minnesota, in that state the franchise tax measured by taxable income is larger than the franchise tax measured by the alternative minimum tax base. So again remember we are assuming the Minnesota tax law is the law in all states. The total franchise tax liability for that state is the larger of the two, which is $21,542.00. But if you go down a ways to, for example, to state nine or home state, in both of those states the

[312] franchise tax measured by taxable income is less than the franchise tax measured by alternative minimum tax base and consequently the total franchise tax liability in those states is greater — being the maximum of the two, is in fact the alternative minimum tax base.

As soon as you have — I'm referring, now, back to my main result. I forgot what exhibit number that was, but there are three possibilities. You have the possibility that — Well, statement B of the main result says: As soon as you have a situation where, assuming that Minnesota's tax law is the law in every state, assuming that you have at least one state in which the corporation pays the franchise tax measured by taxable income, and at least one state in which the corporation pays the franchise tax measured by alternative minimum tax base, as soon as that happens you have one state in which one happens and one state in which the other happens, you immediately have a situation where you have a violation of internal consistency. And that is what happens here.

If we now assume that the entire business of the corporation were within Minnesota, then its franchise tax measured by taxable income would be $495,995.00. The franchise tax measured by alternative minimum tax base
[313] would have been $498,830.00. The tax liability of the corporation doing business entirely within Minnesota would be the larger of those two, which is $498,830.00. However, the tax liability of the corporation doing business in several states is $550,839.00, and that is a violation of internal consistency.

What I would like to emphasize here is that this is just another example of a corporation with a particular structure of apportionment factor. The situation, by my main result, this is just one example of a general phenomena,

and that is any structure — any corporation where there is at least one state in which the alternative minimum tax is applicable, and at least one state where the alternative minimum tax is not applicable, you immediately have a violation of internal consistency. This is a general statement and doesn't depend on looking at particular sales, property and so forth, as soon as you have that situation of a violation of internal consistency.

MR. WALTERS: I have no further questions.
MR. GRELLER: Just a few questions, Your Honor.

*********

# APPENDIX E

## PLAINTIFFS' EXHIBIT NO. 18

### Mathematical Theorems Illustrating Lack of Internal Consistency

**Theorem 10.**

(i) $MT = \sum_{i=1}^{50} MT_i$ ;
(ii) $I \times (.095) = \sum_{i=1}^{50} WT_i$ .

*Proof.*

(i)
$$MT = (.001) \times (S + PR + PA)$$
$$= (.001) \times \left(\sum_{i=1}^{50} S_i + \sum_{i=1}^{50} PR_i + \sum_{i=1}^{50} PA_i\right)$$
$$= (.001) \times \sum_{i=1}^{50} (S_i + PR_i + PA_i)$$
$$= \sum_{i=1}^{50} (.001) \times (S_i + PR_i + PA_i)$$
$$= \sum_{i=1}^{50} MT_i .$$

(ii)

$$\sum_{i=1}^{50} WT_i = \sum_{i=1}^{50} I \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right] \times (.095)$$

$$= I \times (.095) \times \left[\sum_{i=1}^{50} \frac{S_i}{S} \times .7 + \sum_{i=1}^{50} \frac{PR_i}{PR} \times .15 + \sum_{i=1}^{50} \frac{PA_i}{PA} \times (.15)\right]$$

$$= I \times (.095) \times (.7 + .15 + .15)$$

$$= I \times (.095) .$$

**Definition 11.** For $i = 1, \ldots, 50$, let

$$Q_i = \left(\frac{.001}{.095}\right)\left[\frac{S_i + PR_i + PA_i}{\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15}\right] .$$

Let

$$Q_{min} = \min\{Q_i : 1 \leq i \leq 50\}$$
$$Q_{max} = \max\{Q_i : 1 \leq i \leq 50\}$$

that is $Q_{min}$ is the smallest of the $Q_i$'s and $Q_{max}$ is the largest of the $Q_i$'s.

**Theorem 12.**

(i) $I \leq Q_i \iff WT_i \leq MT_i$ ;
(ii) $I < Q_i \iff WT_i < MT_i$ ;
(iii) $Q_i < I \iff MT_i < WT_i$ :
(iv) $Q_i \leq I \iff MT_i \leq WT_i$ ;

*Proof.*

$$I \leq Q_i \iff I \leq \frac{MT_i}{(.095) \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right]}$$

$$\iff I \times (.095) \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right] \leq MT_i$$

$$\iff WT_i \leq MT_i \, .$$

This proves (i). The others are proved similarly. □

**Theorem 13.**

(i) *if* $I \leq Q_{min}$ *then there is no violation;*
(ii) *if* $Q_{min} < I < Q_{max}$ *then there is a violation;*
(iii) *if* $Q_{max} \leq I$ *then there is no violation.*

*Proof.*

(i) Suppose $I \leq Q_{min}$. Then $I \leq Q_i$ for each $i = 1, \ldots, 50$. So, by Theorem 12, in every state $i$, $WT_i \leq MT_i$ and hence $T_i = \max\{WT_i, MT_i\} = MT_i$. Hence, using Theorem 10,

$$T = \sum_{i=1}^{50} T_i = \sum_{i=1}^{50} MT_i = MT \,. \tag{1}$$

Also, using Theorem 10,

$$I \times (.095) = \sum_{i=1}^{50} WT_i \leq \sum_{i=1}^{50} MT_i = MT \,.$$

So

$$T_{int} = \max\{I \times (.095), MT\} = MT \,. \tag{2}$$

From (1) and (2) we have $T_{int} = T$ and hence there is no violation.

(ii) Suppose $Q_{min} < I < Q_{max}$, i.e.

$$\min\{Q_i \,:\, 1 \leq i \leq 50\} < I < \max\{Q_i \,:\, 1 \leq i \leq 50\}$$

so there are states $i'$ and $j'$ such that $Q_{i'} < I < Q_{j'}$.
Since $Q_{i'} < I$ we have $MT_{i'} < WT_{i'}$;
Since $I < Q_{j'}$ we have $WT_{j'} < MT_{j'}$.

Hence,

$$I \times (.095) = \sum_{i=1}^{50} WT_i < \sum_{i=1}^{50} \max\{WT_i, MT_i\} = \sum_{i=1}^{50} T_i = T \qquad (3)$$

and

$$MT = \sum_{i=1}^{50} MT_i < \sum_{i=1}^{50} \max\{WT_i. MT_i\} = \sum_{i=1}^{50} T_i = T \qquad (4)$$

From (3) and (4) we have:

$$T_{int} = \max\{I \times (.095), MT\} < T$$

and so a violation occurs.

(iii) Suppose $Q_{max} \leq I$. Then $Q_i \leq I$ and hence $MT_i \leq WT_i$ for all $i$. Hence, using Theorem 10,

$$MT = \sum_{i=1}^{50} MT_i \leq \sum_{i=1}^{50} WT_i = T \qquad (5)$$

and

$$T = \sum_{i=1}^{50} \max\{WT_i, MT_i\} = \sum_{i=1}^{50} WT_i = I \times (.095) \qquad (6)$$

from (5) and (6):

$$MT \leq T = I \times (.095) \,. \tag{7}$$

Then using (7),

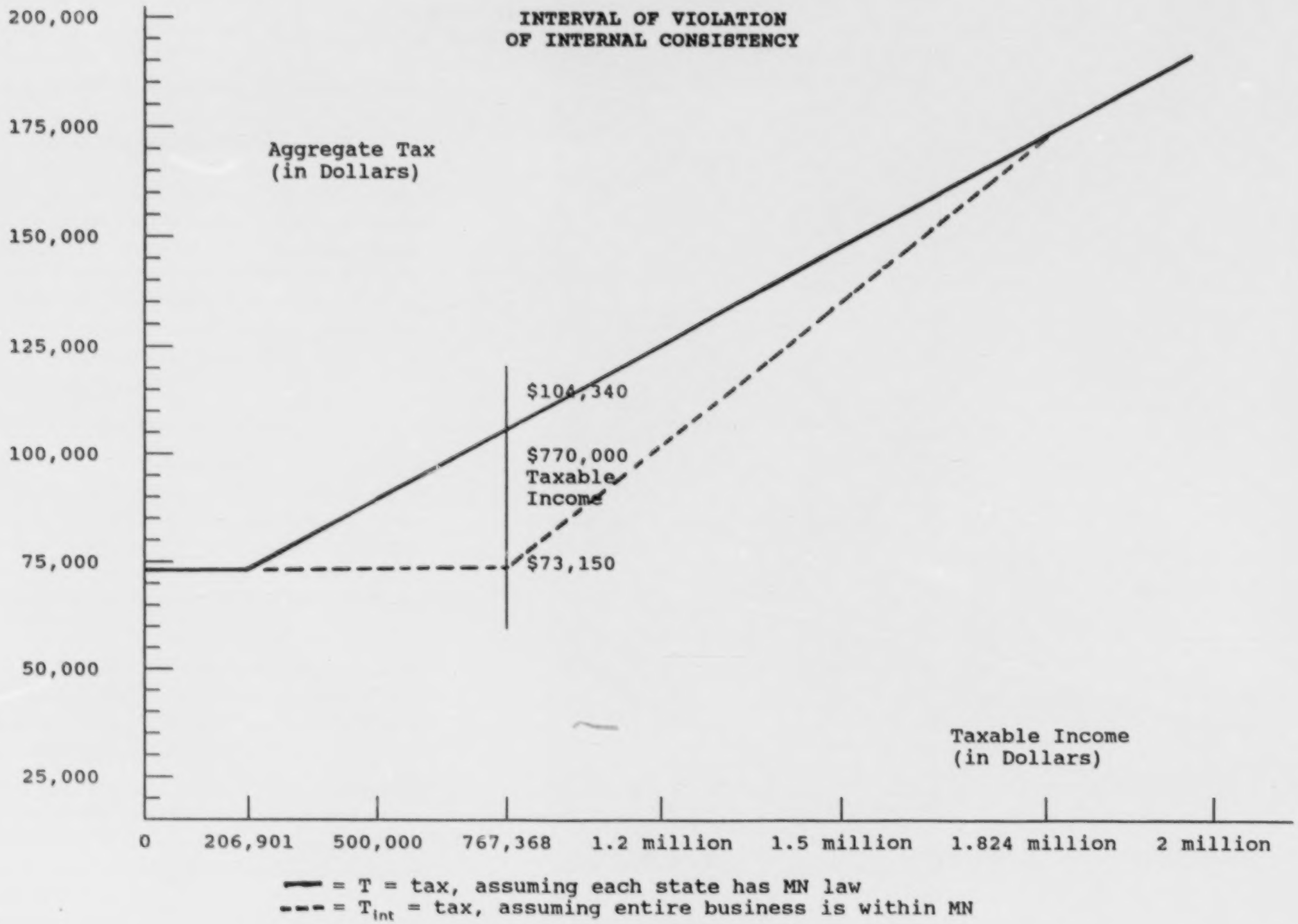
$$T_{int} = \max\{I \times (.095), MT\} = I \times (.095) = T$$

that is $T_{int} = T$ and no violation occurs. □

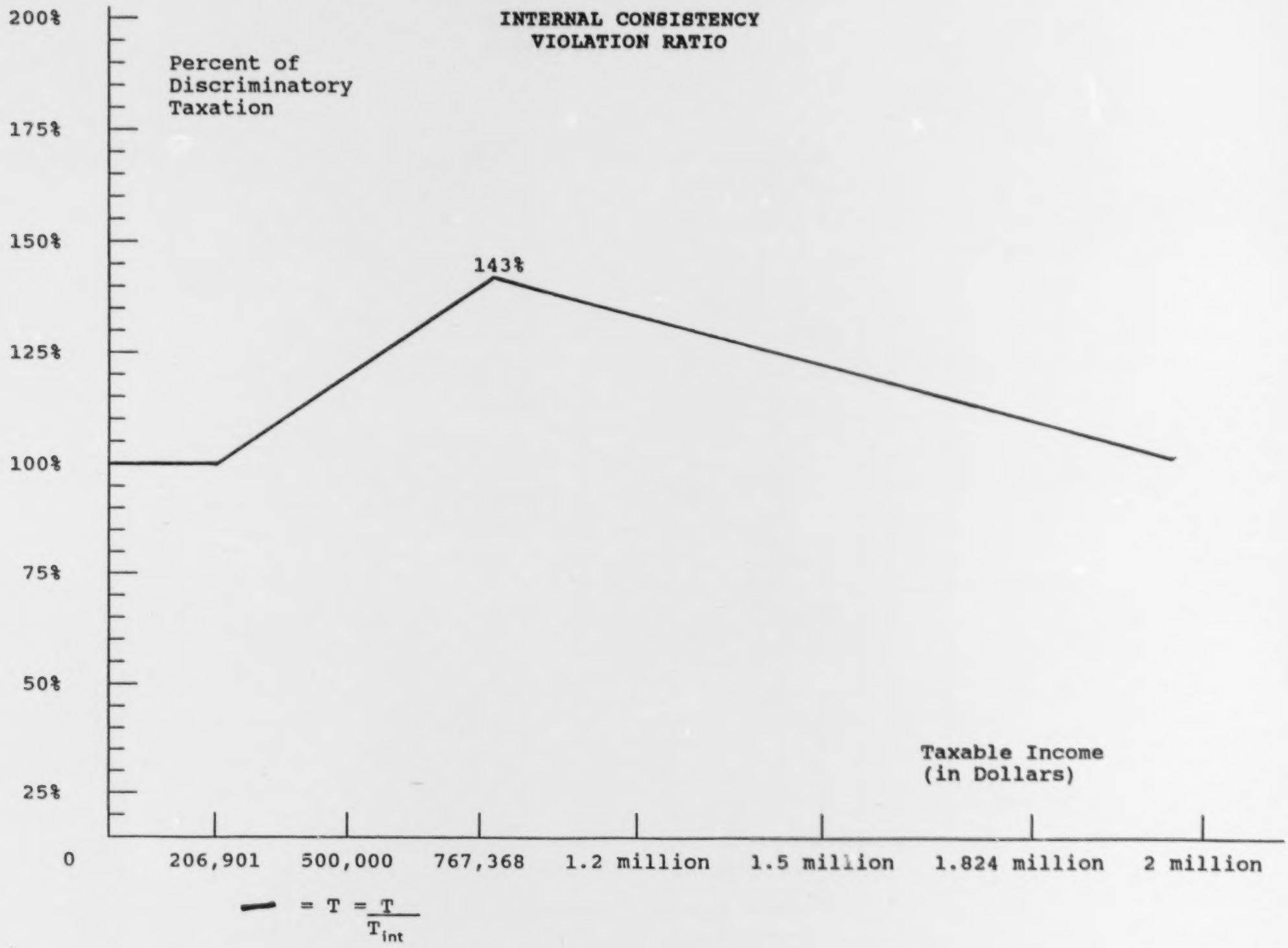
Statements (a), (b), and (c) of the Main Theorem are exactly the cases (i), (ii), and (iii) of the previous theorem (using Theorem 12).

# APPENDIX F

**PLAINTIFFS' EXHIBIT NO. 19**



**PLAINTIFFS' EXHIBIT NO. 20**



# APPENDIX G

## Expert Opinion of Professor Wayne H. Richter

## Minnesota Alternative Minimum Tax Refund Suit

## Definitions and Statement of Results

We describe the circumstances where a Corporation's apportionment factors and level of net income create a violation of internal consistency. We assume that the Corporation's taxes are based on the Weighted Average Method, and the Alternative Minimum Tax as defined below. To describe our results we consider corporations with a fixed structure of apportionment factors, as defined below, and varying levels of net income.

**Main Result.** There are three possibilities:

(a) The Corporation's level of net income is so low that in every state in which it does business the Alternative Minimum Tax is applicable. This case does not create a violation of internal consistency (although this case includes the situation where the Corporation has negative net income but is forced to pay the Alternative Minimum Tax).

(b) There is at least one state in which the Alternative Minimum Tax is applicable, and at least one state in which the Alternative Minimum Tax is not applicable. This case creates a violation of internal consistency.

(c) The Corporation's level of net income is high enough so that there is no state in which the Alternative Minimum Tax is applicable. This case creates no violation of internal consistency (since the Alternative Minimum Tax is never applied).

So for a given Corporation, either the Alternative Minimum Tax never 'comes into play' at all, or there is a violation of internal consistency, unless the Corporation's level of net income is so low that in *every* state in which it does business it is subject to the Alternative Minimum Tax.

Looking at it slightly differently, this says: For a Corporation for whom the Alternative Minimum Tax is applicable in Minnesota, there is a violation of internal consistency, unless its level of income is so low that the Alternative Minimum Tax is applicable in *every* state.

We have assumed in our notation below that the Corporation does business in all 50 states. 50, however, may be replaced by any other number and the results remain the same.

**Definition/. For i=1,.....,50,**

(i) $S_i$ = level of sales in state $i$
(ii) $PR_i$ = level of property in state $i$
(iii) $PA_i$ = level of payroll in state $i$

(iv) $S = \sum_{i=1}^{50} S_i$ = world sales
(v) $PR = \sum_{i=1}^{50} PR_i$ = world value of property
(vi) $PA = \sum_{i=1}^{50} PA_i$ = world payroll
(vii) $I$ = net (world) income.

**Definition 2.** $WT_i$, the *Weighted Average Method* of computing taxes for state $i$, is given by the formula:

$$WT_i = [\textit{taxable income in state } i] \times (.095) ,$$

where,

$$\textit{taxable income in state } i = [\textit{net (world) taxable income}] \times$$

$$\left[\frac{\textit{sales in state } i}{\textit{world sales}} \times .7 + \frac{\textit{property value in state } i}{\textit{world property value}} \times .15 + \frac{\textit{payroll in state } i}{\textit{world payroll}} \times .15\right] .$$

Using the above abbreviations we can write this succintly as

$$WT_i = I \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right] \times (.095)$$

**Definition 3.** $MT_i$, the *Alternative Minimum Tax* in state $i$ is given by the formula:

*tax in state* $i$ =
$[(sales\ in\ state\ i) + (payroll\ in\ state\ i) + (property\ value\ in\ state\ i)] \times .001$

This can be abbreviated by:

$$MT_i = (S_i + PR_i + PA_i) \times (.001)$$

**Definition 4.** $T_i$ is the Corporation's tax liability in state $i$ (*assuming that Minnesota's tax law is applicable in state* $i$). $T_i$ is the larger of the tax in state $i$ computed by the Weighted Average Method and the tax in state $i$ computed by the Alternative Minimum Tax. That is:

$$T_i = \max\{WT_i, MT_i\}.$$

**Definition 5.**

(i) $MT$ is the Alternative Minimum Tax of the Corporation (*assuming that the entire business of the Corporation is within Minnesota*). So

$$MT = (S + PR + PA) \times (.001) .$$

(ii) $T_{int}$ is the total tax liability of the Corporation (*assuming that the entire business of the Corporation is within Minnesota*).

(iii) $T = \sum_{i=1}^{50} T_i$. That is $T$ (the Corporation's *aggregate tax liability*) is the sum of its tax liability in each of the states (*assuming that Minnesota's tax law is applicable in each state*).

Note that $T_{int} = \max\{I \times .095, MT\}$ .

**Definition 6.** The *cumulative regular tax* ($CRT$) of the Corporation's net income is $I \times (.095)$. [1]

[1] Note that if net income is negative, then $CRT$ is negative.

**Definition 7.**

The Alternative Minimum Tax is *applicable in state i* if the Alternative Minimum Tax in state $i$ is greater than the tax computed by the Weighted Average Method in state $i$. That is, the Alternative Minimum Tax is applicable in state $i$, if

$$MT_i > WT_i.$$

The Alternative Minimum Tax is *applicable* if the Alternative Minimum Tax (assuming that the entire business of the Corporation is within Minnesota) is greater than the total tax liability (assuming that the entire business of the Corporation is within Minnesota). That is, the Alternative Minimum Tax is applicable if

$$MT > I \times (.095).$$

**Definition 8.** A *violation of internal consistency* (or simply a *violation*) occurs if $T > T_{int}$, i.e. a violation occurs if the sum of the Corporation's tax liability in each of the states (assuming Minnesota's tax law is in effect in each state) is greater than the Corporation's total tax liability (assuming that all the business of the Corporation is within Minnesota).

**Definition 9.** A *structure of apportionment factors* is a fixed amount of sales, property, and payroll in each state. So two corporation's have the same structure of apportionment factors if in each state they have the same value of sales, property, and payroll.

The question is: *When does a violation occur?*

We begin with the following general observation:

Consider corporations which have the same *structure of apportionment factors* but *different levels of net income.* If net income is small (relative to the structure of apportionment factors) , in particular if net income is negative or zero, then the Alternative Minimum Tax is applicable in *every* state and we have,

$$T_{int} = MT = \sum_{i=1}^{50} MT_i = T,$$

i.e. $T_{int} = T$ and so no violation occurs.[2] On the other hand if net income is large (relative to the structure of apportionment factors), then the Alternative Minimum Tax is not applicable in *any* state and the Alternative Minimum Tax is not applicable, and so there is no violation. Thus for small (negative, for example) levels of net income there is no violation; also for large levels of net income there is no violation. We make this more precise in Theorem 13 below.

We now assume a *fixed structure of apportionment factors.*

[2] Although in this case there may well be other reasons why this is considered to be a 'violation' since the Corporation is paying a tax in the amount of $MT$ even though its net income is negative.

## The mathematics

**Theorem 10.**

(i) $MT = \sum_{i=1}^{50} MT_i$ ;
(ii) $I \times (.095) = \sum_{i=1}^{50} WT_i$ .

*Proof.*
(i)

$$\begin{aligned} MT &= (.001) \times (S + PR + PA) \\ &= (.001) \times (\sum_{i=1}^{50} S_i + \sum_{i=1}^{50} PR_i + \sum_{i=1}^{50} PA_i) \\ &= (.001) \times \sum_{i=1}^{50} (S_i + PR_i + PA_i) \\ &= \sum_{i=1}^{50} (.001) \times (S_i + PR_i + PA_i) \\ &= \sum_{i=1}^{50} MT_i \ . \end{aligned}$$

(ii)

$$\sum_{i=1}^{50} WT_i = \sum_{i=1}^{50} I \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right] \times (.095)$$

$$= I \times (.095) \times \left[\sum_{i=1}^{50} \frac{S_i}{S} \times .07 + \sum_{i=1}^{50} \frac{PR_i}{PR} \times .15 + \sum_{i=1}^{50} \frac{PA_i}{PA} \times (.15)\right]$$

$$= I \times (.095) \times (.07 + .15 + .15)$$

$$= I \times (.095) .$$

□

**Definition 11.** For $i = 1, \ldots, 50$, let

$$Q_i = \left(\frac{.001}{.095}\right)\left[\frac{S_i + PR_i + PA_i}{\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15}\right] .$$

Let

$$Q_{min} = \min\{Q_i : 1 \leq i \leq 50\}$$
$$Q_{max} = \max\{Q_i : 1 \leq i \leq 50\}$$

that is $Q_{min}$ is the smallest of the $Q_i$'s and $Q_{max}$ is the largest of the $Q_i$'s.

**Theorem 12.**

(i) $I \leq Q_i \iff WT_i \leq MT_i$ ;
(ii) $I < Q_i \iff WT_i < MT_i$ ;
(iii) $Q_i < I \iff MT_i < WT_i$ ;
(iv) $Q_i \leq I \iff MT_i \leq WT_i$ ;

*Proof.*

$$I \leq Q_i \iff I \leq \frac{MT_i}{(.095) \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right]}$$

$$\iff I \times (.095) \times \left[\frac{S_i}{S} \times .7 + \frac{PR_i}{PR} \times .15 + \frac{PA_i}{PA} \times .15\right] \leq MT_i$$

$$\iff WT_i \leq MT_i .$$

This proves (i). The others are proved similarly. □

**Theorem 13.**

(i) *if* $I \leq Q_{min}$ *then there is no violation;*
(ii) *if* $Q_{min} < I < Q_{max}$ *then there is a violation;*
(iii) *if* $Q_{max} \leq I$ *then there is no violation.*

*Proof.*

(i) Suppose $I \leq Q_{min}$. Then $I \leq Q_i$ for each $i = 1, \ldots, 50$. So, by Theorem 12, in every state $i$, $WT_i \leq MT_i$ and hence $T_i = \max\{WT_i, MT_i\} = MT_i$. Hence, using Theorem 10,

$$T = \sum_{i=1}^{50} T_i = \sum_{i=1}^{50} MT_i = MT \,. \tag{1}$$

Also, using Theorem 10,

$$I \times (.095) = \sum_{i=1}^{50} WT_i \leq \sum_{i=1}^{50} MT_i = MT \,.$$

So

$$T_{int} = \max\{I \times (.095), MT\} = MT \,. \tag{2}$$

From (1) and (2) we have $T_{int} = T$ and hence there is no violation.

(ii) Suppose $Q_{min} < I < Q_{max}$, i.e.

$$\min\{Q_i \,:\, 1 \leq i \leq 50\} < I < \max\{Q_i \,:\, 1 \leq i \leq 50\}$$

so there are states $i'$ and $j'$ such that $Q_{i'} < I < Q_{j'}$.
Since $Q_{i'} < I$ we have $MT_{i'} < WT_{i'}$;
Since $I < Q_{j'}$ we have $WT_{j'} < MT_{j'}$.

Hence,

$$I \times (.095) = \sum_{i=1}^{50} WT_i < \sum_{i=1}^{50} \max\{WT_i, MT_i\} = \sum_{i=1}^{50} T_i = T \qquad (3)$$

and

$$MT = \sum_{i=1}^{50} MT_i < \sum_{i=1}^{50} \max\{WT_i, MT_i\} = \sum_{i=1}^{50} T_i = T \qquad (4)$$

From (3) and (4) we have:

$$T_{int} = \max\{I \times (.095), MT\} < T$$

and so a violation occurs.

(iii) Suppose $Q_{max} \leq I$. Then $Q_i \leq I$ and hence $MT_i \leq WT_i$ for all $i$. Hence, using Theorem 10,

$$MT = \sum_{i=1}^{50} MT_i \leq \sum_{i=1}^{50} WT_i = T \qquad (5)$$

and

$$T = \sum_{i=1}^{50} \max\{WT_i, MT_i\} = \sum_{i=1}^{50} WT_i = I \times (.095) \qquad (6)$$

from (5) and (6):

$$MT \leq T = I \times (.095) \, . \tag{7}$$

Then using (7),

$$T_{int} = \max\{I \times (.095), MT\} = I \times (.095) = T$$

that is $T_{int} = T$ and no violation occurs. □

Statements (a), (b), and (c) of the Main Theorem are exactly the cases (i), (ii), and (iii) of the previous theorem (using Theorem 12).

## An Example

As an illustration we look at the structure of apportionment factors given in the example of Jagiela in the status report of December 18, 1989. In that example the values of the various $Q_i$ are:

$$
\begin{aligned}
Q_{Minn.} &= \$206,384 \\
Q_1 &= 206,384 \\
Q_2 &= 243,993 \\
Q_3 &= 243,332 \\
Q_4 &= 206,658 \\
Q_5 &= 243,993 \\
Q_6 &= 243,993 \\
Q_7 &= 378,142 \\
Q_8 &= 1,230,486 \\
Q_{home} &= 1,819,257 \\
Q_{min} &= Q_1 = 206,384 \\
Q_{max} &= Q_{home} = 1,819,257
\end{aligned}
$$

Thus if net income is less than \$206,384 then the Alternative Minimum Tax is applicable in every state and there is no violation. If net income is between \$206,384 and \$1,819,257 then there is a violation. If net income is greater than \$1,819,257 then the Alternative Minimum Tax is not applicable in any state and there is no violation. Note that in the given example, net income was taken to be \$770,000 which is a violation.

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Associate Professor of
Mathematics
Unversity of Minnesota
October 19, 1991

## APPENDIX H

## PLAINTIFFS' EXHIBIT NO. 21

X Corporation
Hypothetical Apportionment Factor
and Net Taxable Income Structure

X Corporation

Apportionment Factors:

| State | Sales | Property | Payroll |
|---|---|---|---|
| Minnesota | $500,000 | $ 100,000 | $ 150,000 |
| State #1 | 500,000 | 100,000 | 150,000 |
| State #2 | 1,000,000 | 500,000 | 150,000 |
| State #3 | 2,000,000 | 1,000,000 | 150,000 |
| State #4 | 2,000,000 | 500,000 | 150,000 |
| State #5 | 1,000,000 | 500,000 | 150,000 |
| State #6 | 1,000,000 | 500,000 | 150,000 |
| State #7 | 1,000,000 | 1,500,000 | 150,000 |
| State #8 | 500,000 | 10,000,000 | 1,000,000 |
| Home State | 1,500,000 | 43,500,000 | 1,500,000 |
| | $11,000,000 | $58,200,000 | $3,700,000 |

Net Taxable Income—$770,000

## PLAINTIFFS' EXHIBIT NO. 22

X Corporation
Computation of Minnesota Franchise
Tax Measured by Taxable Income and
Alternative Minimum Tax Base

*X Corporation—Doing Business Wholly Within Minnesota*

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = 9.5% X 770,000 | = | $73,150 |
| Franchise Tax Measured by Alternative Minimum Tax Base | = 1/10th % X $11,000,000 sales | = | $11,000 |
| | = 1/10th % X 58,200,000 property | = | $58,200 |
| | 1/10th % X 3,700,000 payroll | = | $ 3,700 |
| | | | $72,900 |
| Franchise Tax Imposed Upon X Corporation | Franchise Tax Measured = By Taxable Income | = | $73,150 |
| | *plus* | | |
| | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | | $73,150 + (if $72,900 - $73,150 > 0, then $72,900 - $73,150, otherwise 0) |

Minn. Stat. § 290.02, § 290.06, § 290.092, § 290.191.

*X Corporation—Doing Business in 9 states and Minnesota*

Minnesota

| | | | | |
|---|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | ((\$500,000 X 70%) + (\$100,000 X 15%) 11,000,000 + (\$150,000 X 15%)) X 58,200,000 3,700,000 9.5% X \$770,000 | = | \$ 2,791 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X \$500,000 sales<br>1/10th % X \$100,000 property<br>1/10th % X \$150,000 payroll | = | \$ 500<br>100<br>150<br>\$ 750 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | = | \$ 2,791 |
| | | *plus* | | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | > | \$2,791 + (If \$750-\$2,791 0, then \$750 - \$2,791, otherwise 0) |

State #1

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | (($500,000 X 70%) + ($100,000 X 15%) 11,000,000 + ($150,000 X 15%)) X 3,700,000 9.5% X $770,000 | = 58,200,000 = $ 2,791 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X $500,000 sales<br>1/10th % X $100,000 property<br>1/10th % X $150,000 payroll | = $ 500<br>100<br>150<br>$ 750 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | = | $ 2,791 |
| | | *plus* | | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | > | $2,791 + (If $750-$2,791 0, then $750 - $2,791, otherwise 0) |

State #2

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | (($1,000,000 X 70%) + ($500,000 X 15%)) 11,000,000 + ($150,000 X 15%)) X 3,700,000 58,200,000 9.5% X $770,000 | $ 5,194 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X $1,000,000 sales<br>1/10th % X $500,000 property<br>1/10th % X $150,000 payroll | $ 1,000<br>500<br>150<br>$1,650 |

| | | | |
|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | $ 5,194 |
| | | *plus* | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | $5,194 + (If $1,650-$5,194 > 0, then $1,650 - $5,194 otherwise 0) |

State #3

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | (($2.000,000 X 70%) + ($1,000,000 X 15%) 11,000,000 58,200,000 + ($150,000 X 15%)) X 3,700,000 9.5% X $770,000 | = $ 9,943 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X $2,000,000 sales<br>1/10th % X $1,000,000 property<br>1/10th % X $150,000 payroll | = $ 2,000<br>1,000<br>150<br>$3,150 |

| | | | |
|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | = $ 9,943 |
| | | *plus* | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | $9,943 + (If ($3,150 - $9,943 > 0), ($3,150 - $9,943), 0) |

State #4

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | ((\$2,000,000 X 70%) + (\$500,000 X 15%) 11,000,000 58,200,000 + (\$150,000 X 15%)) X 3,700,000 9.5% X \$770,000 | = \$ 9,850 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X \$2,000,000 sales<br>1/10th % X \$500,000 property<br>1/10th % X \$150,000 payroll | = | \$ ~~2,000~~<br>500<br>150<br>\$ 2,650 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | = | \$ 9,850 |
| | | *plus* | | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | | \$9,850 + (If \$2,650-\$9,850 > 0, then \$2,650 - \$9,850 otherwise 0) |

State #5

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | (($1,000,000 X 70%) + ($500,000 X 15%) 11,000,000 + ($150,000 X 15%)) X 3,700,000 9.5% X $770,000 | = $ 5,194 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X $1,000,000 sales<br>1/10th % X $500,000 property<br>1/10th % X $150,000 payroll | = $ 1,000<br>500<br>150<br>$ 1,650 |

| | | | |
|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | = $ 5,194 |
| | | *plus* | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | $5,194 + (If 1,650-$5,194 > 0, then $1,650-$5,194 otherwise 0) |

State #6

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = (($1,000,000 X 70%) + ($500,000 X 15%)) 11,000,000 + ($150,000 X 15%)) X 3,700,000 9.5% X $770,000 | 58,200,000 = | $ 5,194 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = 1/10th % X $1,000,000 sales<br>1/10th % X $500,000 property<br>1/10th % X $150,000 payroll | = | $ 1,000<br>500<br>150<br>$ 1,650 |

| | | | |
|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = Franchise Tax Measured by Taxable Income | = | $ 5,194 |
| | *plus* | | |
| | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | | $5,194 + (If $1,650-$5,194 > 0, then $1,650-$5,194 otherwise 0) |

State #7

| | | | | |
|---|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | ((\$1,000,000 X 70%) + (\$1,500,000 X 15%) 11,000,000 58,200,000 + (\$150,000 X 15%)) X 3,700,000 9.5% X \$770,000 | = | \$ 5,383 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X \$1,000,000 sales<br>1/10th % X \$1,500,000 property<br>1/10th % X \$150,000 payroll | = | \$ 1,000<br>1,500<br>150<br>\$ 2,650 |

| | | | | |
|---|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income<br>*plus*<br>The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | = | \$ 5,383<br><br>\$5,383 + (If \$2,650-\$5,383 > 0, then \$2,650-\$5,383 otherwise 0) |

State #8

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | (($500,000 X 70%) + ($10,000,000 X 15%) 11,000,000 58,200,000 + ($1,000,000 X 15%)) X 3,700,000 9.5% X $770,000 | = $ 7,178 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X $500,000 sales | $ 500 |
| | | 1/10th % X $10,000,000 property | = 10,000 |
| | | 1/10th % X $1,000,000 payroll | 1,000 |
| | | | $11,500 |

| | | | |
|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | = $ 11,500 |
| | | *plus* | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | $7,178 + (If $11,500 - $7,178 > 0 then $11,500 - $7,178*, otherwise 0) |

(*$11,500 - $7,178 =$4,322)

Home State

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Taxable Income | = | ((\$1,500,000 X 70%) + (\$43,500,000 X 15%) 11,000,000 58,200,000 + (\$1,500,000 X 15%)) X 3,700,000 9.5% X \$770,000 | \$19,632 |

| | | | |
|---|---|---|---|
| Franchise Tax Measured by Alternative Minimum Tax Base | = | 1/10th % X 1,\$500,000 sales<br>1/10th % X \$43,500,000 property<br>1/10th % X \$1,500,000 payroll | \$ 1,500<br>43,500<br>1,500<br>\$46,500 |

| | | | |
|---|---|---|---|
| Franchise Tax Imposed Upon X Corporation | = | Franchise Tax Measured by Taxable Income | \$ 46,500 |
| | | *plus* | |
| | | The Excess, if any, of 1/10th % X AMT Tax Base over Franchise Tax Measured by Taxable Income | \$19,632 + (If \$46,500 - \$19,632 > 0, then \$46,500 - 19,632*, otherwise 0) |

(*\$46,500 - \$19,632 = \$26,868)

## PLAINTIFFS' EXHIBIT NO. 23

### X Corporation
### Schedule of Total Franchise Tax Liability

*X Corporation—Doing Business Wholly Within Minnesota*

| State | Franchise Tax Measured By Taxable Income | Franchise Tax Measured By Alternative Minimum Tax Base | Total Franchise Tax Liability |
|---|---|---|---|
| Minnesota | $73,150 | $72,900 | $73,150 |

*X Corporation—Doing Business in 9 States and Minnesota*

| State | Franchise Tax Measured By Taxable Income | Franchise Tax Measured By Alternative Minimum Tax Base | Total Franchise Tax Liability |
|---|---|---|---|
| Minnesota | $ 2,791 | $ 750 | $ 2,791 |
| State #1 | 2,791 | 750 | 2,791 |
| State #2 | 5,194 | 1,650 | 5,194 |
| State #3 | 9,943 | 3,150 | 9,943 |
| State #4 | 9,850 | 2,650 | 9,850 |
| State #5 | 5,194 | 1,650 | 5,194 |
| State #6 | 5,194 | 1,650 | 5,194 |
| State #7 | 5,383 | 2,650 | 5,383 |
| State #8 | 7,178 | 11,500 | 11,500 |
| Home State | 19,632 | 46,500 | 46,500 |
| | $ 73,150 | $72,900 | $104,340 |

## PLAINTIFFS' EXHIBIT NO. 24

### X Corporation
### Schedule of Credit Allowed for Franchise Tax Measured by Taxable Income Against Franchise Tax Measured By Alternative Minimum Tax Base

*X Corporation—Doing Business Wholly Within Minnesota*

| State | Franchise Tax Measured By Taxable Income | Franchise Tax Measured By Alternative Minimum Tax Base | Credit Allowed | Total Franchise Tax Liability |
|---|---|---|---|---|
| Minnesota | $73,150 | $72,900 | $72,900 | $73,150 |
| | $73,150 | $72,900 | $72,900 | $73,150 |

## PLAINTIFFS' EXHIBIT NO. 25

### X Corporation
### Schedule of Excess Franchise Taxes Paid Measured By Taxable Income

*X Corporation—Doing Business in 9 States and Minnesota*

| State | Franchise Tax Measured By Taxable Income | Franchise Tax Measured By Alternative Minimum Tax Base | Excess Franchise Taxes Paid Measured By Taxable Income |
|---|---|---|---|
| Minnesota | $ 2,791 | $ 750 | $ 2,041 |
| State #1 | 2,791 | 750 | 2,041 |
| State #2 | 5,194 | 1,650 | 3,544 |
| State #3 | 9,943 | 3,150 | 6,793 |
| State #4 | 9,850 | 2,650 | 7,200 |
| State #5 | 5,194 | 1,650 | 3,544 |
| State #6 | 5,194 | 1,650 | 3,544 |
| State #7 | 5,383 | 2,650 | 2,733 |
| State #8 | 7,178 | 11,500 | -0- |
| Home State | 19,632 | 46,500 | -0- |
| | $73,150 | $72,900 | $31,440 |

Supreme Court, U.S.
FILED
SEP 23 1996
CLERK

No. 96-309

In The

# Supreme Court of the United States

October Term, 1995

FAIRWAY FOODS, INC. and HENKEL CORPORATION,

*Petitioners,*

v.

STATE OF MINNESOTA AND JAMES L. GIRARD, IN HIS CAPACITY AS COMMISSIONER OF REVENUE,

*Respondents.*

**On Petition For Writ Of Certiorari To The Minnesota Supreme Court**

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Minnesota Supreme Court correctly held that Petitioners had failed to prove that the Minnesota Alternative Minimum Tax on Corporations (AMT) violated the Commerce Clause "internal consistency" test when they failed to show that they – or any actual taxpayer – would be subject to additional tax burdens even if all states imposed the identical tax.

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## RESPONDENTS' BRIEF IN OPPOSITION

The Respondents State of Minnesota and the Commissioner of Revenue respectfully request that the Court deny the petition for writ of certiorari seeking review of the decision of the Supreme Court of Minnesota in this case. The opinion of the Minnesota Supreme Court (Pet. App. 1a-14a) is reported as *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285 (Minn. 1996). The opinion of the Minnesota district court is reproduced in the appendix to the petition at pages 15a-39a.

## STATEMENT OF THE CASE

This case is a constitutional challenge to Minnesota tax statutes imposing an alternative minimum franchise tax on corporations (the "AMT") for the years 1987 through 1989.[1] Minn. Stat. §§ 290.02, 290.092 (Supp. 1987). The only issue on appeal is whether the AMT violates the "internal consistency" standard under the fair apportionment prong of the four-part test for whether state tax laws violate the Commerce Clause.[2]

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[1] For purposes of this litigation, 1987 was chosen as the "test year" by stipulation of the parties.

[2] Under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a state tax is valid under the Commerce Clause if it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state. *Id.* at 279.

The internal consistency requirement was first articulated by the court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983) as follows:

> Having determined that a certain set of activities constitute a "unitary business," a State must then apply a formula apportioning the income of that business within and without the State. Such an apportionment formula must, under both the Due Process and Commerce Clauses, be fair. The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency – that is, the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business income being taxed.

*Id.* at 169 (citations omitted).

Although first applied to apportionment formulas, the internal consistency requirement has since been used in a variety of state tax cases, always to determine "the logical consequences of cloning" a particular state's taxes. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, ___, 115 S. Ct. 1331, 1338 (1995). As the Court recently stated, "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.*

As in effect during the 1987-89 period, the AMT imposed a tax of 1/10 of 1% on the sum of a corporation's three Minnesota business factors of sales, property and

payroll, without regard to its "income" or profits.[3] The tax was payable by corporations whose alternative minimum tax liabilities exceeded their income-based regular corporate franchise tax liabilities.

The AMT was computed under Minn. Stat. § 290.092, subd. 1 (Supp. 1987), which read:

> For taxable years beginning after December 31, 1986, and before January 1, 1990, in addition to the taxes computed under this chapter without regard to this section, the franchise tax imposed on corporations includes a tax equal to the excess, if any, of:
>
> (1) .001 multiplied by the alternative minimum tax base, over
>
> (2) the amount of tax computed under this chapter without regard to this section.

The "alternative minimum tax base" referred to in the statute was the sum of the same property, payroll and sales factors corporate taxpayers used to apportion their income to Minnesota for their regular franchise tax.

The regular income-based franchise tax, computed under Minn. Stat. § 290.06 (Supp. 1987), and the AMT interacted, with the net effect that corporations paid the higher of their AMT tax base multiplied by .1 percent, or their regular franchise tax. Looked at in another way, this interaction between the two taxes may be described as

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[3] The factors-based AMT was repealed for tax years after 1989 and replaced with a tax which piggy-backed on the federal alternative minimum tax for corporations. Minn. Stat. § 290.092, subd. 5 (Supp. 1987) (Pet. App. 44a). The replacement tax is not being challenged in this proceeding.

imposing both the regular franchise tax and a flat .1% "factors tax" on corporations, with a credit for payment of the regular franchise tax against the factors-based tax.

Either way, it is the combined effect of the two taxes that Petitioners challenge in their claim under the Commerce Clause. Neither tax, considered alone, is objectionable. Neither tax is imposed on income earned or assets located outside the State of Minnesota. Neither tax distinguishes between corporations doing business entirely within Minnesota and those doing business within and outside the state. As Petitioners have candidly conceded, there is no Commerce Clause issue if *both* taxes are imposed with no credit for payment of one against the other. Pet. at 17.

Before adoption of the AMT in 1987, the Minnesota Department of Revenue estimated that only approximately one-half of all corporations doing business in Minnesota and subject to taxation paid any corporate franchise tax in any given year. Prior to 1987, the Minnesota corporate franchise tax was imposed at a rate of 12% of taxable income, one of the highest corporate tax rates in the nation. Because of its sensitivity to the economic cycle and because of its structure, the pre-1987 Minnesota corporate franchise tax was one of the most, if not the most, volatile taxes imposed by Minnesota. Revenues were extremely unpredictable both in amount and availability. Pet. App. 24a.

In 1987, the Minnesota franchise tax was substantially amended. The 1987 amendments were the result of a statewide study by a blue-ribbon panel appointed by the Governor. The study proposed major tax reforms

including, *inter alia*, a reduction in the corporate franchise tax rate from 12% to 8.9%, the adoption of a minimum tax on business activities within the state, the elimination of net operating loss carry-backs, repeal of the arithmetic apportionment option, and conformance to federal corporate tax amendments. Pet. App. 25a.

The 1987 changes were intended to expand the corporate tax base, to add fairness by increasing the number of corporations paying business taxes, to simplify the corporate tax, to generate additional revenues, to add stability and predictability to the corporate tax revenues, to reduce the burden on highly-taxed businesses, and to remove Minnesota from the highest ranking corporate tax rate states. Pet. App. 25a.

The AMT proposed by the study was conceived of as a tax on business activity occurring in Minnesota, as measured by three factors: Minnesota property, Minnesota payroll, and Minnesota sales. These factors were used because they were broad, neutral measures of business activity, readily available, and easy to use. The three factors recommended as the AMT tax base were also chosen because they were neutral, indifferent to profit, did not penalize profitable corporations, and taxed corporations on a fair and equitable basis. Pet. App. 25a-26a. A major premise behind the adoption of the AMT was that income alone was not the best basis for taxing business, because it is only one measure of activity and because it discriminates against businesses that are profitable. Pet. App. 26a.

Beginning in 1989, over 100 tax refund actions were filed in Minnesota district court by business corporations

seeking refunds of corporate franchise taxes for the years 1987 through 1989, when the factors-based AMT was in effect. The cases were consolidated for trial by the district court on the basis of the claims of three representative plaintiffs: Fairway Foods, Inc., Henkel Corporation, and Juba's, Inc.[4]

Prior to trial, the parties entered into an extensive Stipulation of Facts. In addition, a three-day trial was held at which a variety of expert witness testimony, deposition testimony and documentary evidence was introduced.

The facts relating to the two remaining plaintiffs, who are the Petitioners here, are set forth in the trial court's findings of fact, reproduced at Pet. App. 16a-18a (Henkel Corporation) and 21a-24a (Fairway Foods, Inc.). At trial, the only evidence submitted by the Petitioners concerning the alleged Commerce Clause violation here at issue was the testimony of Petitioners' expert witness, a mathematics professor. For purposes of his testimony, the expert was given a definition of when a "violation" of internal consistency occurs by Petitioners' counsel. Pet. App. 69a. The mathematician did not claim to have any legal expertise and admitted that this definition of a violation of internal consistency expressed only his

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[4] The three "test plaintiffs" were chosen by agreement of the parties. Juba's, Inc. has not joined in the petition, presumably because it does business solely within Minnesota and thus has no standing to raise a Commerce Clause claim, which is the only claim remaining in this case out of fourteen counts originally included in the Consolidated Complaint. As discussed below, there is also a serious question whether either of the Petitioners could show a violation of the Commerce Clause. They have not done so to date. See *infra* Part II, note 14.

understanding of what Petitioners' counsel had told him. T. 218.

Using mathematical theories and a hypothetical taxpayer (X Corporation), Petitioners' expert sought to demonstrate that, depending on the corporation's income level and structure of apportionment factors, the sum of the corporation's AMT and regular franchise tax liabilities in each of the states in which it does business (assuming that each state had in effect the same tax law as Minnesota) could under certain circumstances exceed the corporation's total tax liability if all its property, payroll, and income were instead concentrated in a single state. Pet. App. 69a. It was clear from the expert's testimony, however, that for any given structure of apportionment factors (payroll, property and sales in each state where it does business), this result would obtain only within a limited range of taxable income levels. Any taxable income above or below this "interval of violation," as Petitioners' expert called it, produces no difference in total tax burdens and no "violation" as defined by the professor. Pet. App. 70a. Significantly, no evidence or testimony was offered as to whether the taxable income of any of the three representative plaintiffs – or indeed that of any plaintiff in the 100 pending cases – fell within this "interval" during any of the relevant years. In fact, no evidence was offered as to what the interval would have been for any of the plaintiff corporations.

The trial court concluded that "[t]he imposition of the AMT on plaintiffs does not constitute an unlawful burden on interstate commerce in violation of the rights guaranteed plaintiffs by the Commerce Clause of the United States Constitution." Pet. App. 30a. On appeal, the

Minnesota Supreme Court affirmed this conclusion. *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285 (Minn. 1996). Pet. App. 1a. The Minnesota Supreme Court based its decision in part on the uncontroverted fact that Petitioners had failed to show that any existing taxpayer would experience tax results similar to the hypothetical X Corporation, even if all 50 states imposed the same tax as Minnesota. Pet. App. 10a. Under Petitioners' own proposed test, therefore, no violation of internal consistency has been shown to have occurred. Pet. App. 70a, 77a.[5]

## REASONS FOR DENYING THE PETITION

There is no reason for the Court to grant review in this case. The decision of the Minnesota Supreme Court is neither contrary to the decisions of this Court nor those of any other state court of last resort. This case demonstrates no need for the Court to clarify the principle of internal consistency under the four-part test for violations of the Commence Clause established by *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Nor is the question presented by the facts in this case likely to recur. Among the states, Minnesota was alone in adopting a factors-based AMT, which has since been repealed. As

[5] During oral argument, Justice Gardebring of the Minnesota Supreme Court analogized this failure to prove a violation to a lack of standing on the part of the Petitioners. Indeed, because of its income level, Petitioner Henkel Corporation could not possibly have shown that it was similarly situated to X Corporation, and Petitioner Fairway Foods, Inc. did not even try to do so. See *infra* Part II, note 14.

Petitioners admit, no other state has adopted, or shown an inclination to adopt, a similar tax. There is, therefore, no compelling need for the Court to resolve a conflict among the lower courts or provide additional guidance to the states. Finally, Petitioners have failed to show that any actual taxpayer was harmed by the tax. Petitioners do not, therefore, meet their own test for a "violation" of the internal consistency requirement. Finally, even if Petitioners' hypothetical corporation is assumed to exist, the Minnesota tax does not violate the Court's internal consistency test.

## I. THE ISSUE IN THIS CASE IS OF LIMITED SIGNIFICANCE SINCE THE MINNESOTA TAX HAS BEEN REPEALED, NO OTHER STATE HAS ADOPTED OR IS LIKELY TO ADOPT A SIMILAR TAX, AND NO TAXPAYER HAS BEEN SHOWN TO HAVE BEEN EVEN POTENTIALLY HARMED BY THE TAX.

Petitioners urge the Court to grant the petition on the grounds that the question decided by the Minnesota court is a "recurring issue of profound national significance," (Pet. at 14) and that the decision will "preclude the simple application of the bright-line internal consistency test." (Pet. at 18-19). In fact, the petition does not meet any of the criteria for granting a petition for a writ of certiorari set forth in Rule 10 of the Rules of this Court.

The internal consistency test, first articulated by the Court in *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983), has been referred to or applied by the Court on a number of occasions and in a variety of contexts. *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) (wholesale gross receipts tax imposed on

non-domiciliary corporations while exempting local manufacturers wholesaling in the state violates internal consistency test); *Tyler Pipe Industries, Inc. v. Washington Department of Revenue,* 483 U.S. 232 (1987) (state business and occupations tax which treated goods manufactured elsewhere less favorably than those manufactured within the taxing state violates internal consistency test); *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987) (unapportioned axle tax subjecting interstate truckers entering Pennsylvania to higher per mile costs of operation than purely intrastate truckers violates internal consistency). *See also Trinova Corp. v. Michigan Department of Treasury,* 498 U.S. 358, 385 (1991) (referring to internal and external consistency tests as expressing the fair apportionment requirement of the Commerce Clause); *Goldberg v. Sweet,* 488 U.S. 252, 261 (1989) (reiterating the internal consistency test as an aspect of fair apportionment); *Oklahoma Tax Commission v. Jefferson Lines,* 514 U.S. ___, ___, 115 S. Ct. 1331, 1338 (1995) (no failure of internal consistency results from a tax on sales of tickets for bus travel imposed by the state where travel originates). Thus, there is no lack of guidance to the state courts in this area of the law.

In its decision, the Minnesota Supreme Court correctly articulated and applied the internal consistency test, referring to this Court's most recent restatement of the standard as follows:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of

> the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.

*In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 289-90, *quoting Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. at ___, 115 S. Ct. at 1338 (1995). Pet. App. 8a.

It is not true, as Petitioners assert, that the Minnesota Supreme Court's decision "creates an additional burden of proof to show that the actual plaintiff in the case is in fact *presently adversely affected* by the lack of internal consistency without providing any 'precise guides' as to exactly how a taxpayer is supposed to satisfy this additional burden of proof." Pet. at 19 (emphasis added). To the contrary, the Minnesota court stated. "[Petitioners] correctly observe that the internal consistency test involves the hypothetical imposition of the tax by every state." *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290, Pet. App. at 9a. What troubled the Minnesota court was that Petitioners offered no evidence that any actual taxpayer would be negatively impacted by the AMT *even assuming the imposition of an identical tax by every state in the union.*[6]

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[6] Unlike the West Virginia Tax Commissioner in *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), neither the Minnesota Commissioner nor the Minnesota Supreme Court has suggested

The issue Petitioners ask this Court to address is whether, in order to prove that a state tax is facially invalid under the internal consistency test, it is sufficient merely to show that it is possible to conceive of a set of circumstances in which an interstate business would have a higher total tax burden than it would have if its entire business were concentrated in a single state.[7] As explained below, Petitioners' own test thus goes beyond the initial hypothetical cloning of the tax in issue, and requires a detailed analysis of a specific taxpayer's structure of apportionment factors and level of income before it can be determined whether a "violation," as Petitioners' mathematics expert defined it, can occur.[8] It was

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that Petitioners must "prove actual discriminatory impact on [themselves] by pointing to a state that imposes a [similar] tax that results in a total burden higher than that imposed on [their] competitors in [the taxing state]." *Id.* at 644. Rather, it is the Petitioners' failure to demonstrate (or even allege) that any actual taxpayer would be subject to additional tax burdens, even when the existence of identical tax structures in other jurisdictions is assumed, that is so conspicuous in this case.

[7] Petitioners would thus turn on its head the well-settled proposition that a challenger attacking the facial validity of a legislative act must establish that *no* set of circumstances exists under which the act is valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (non-tax case).

[8] The lower court decisions cited by Petitioners (Pet. at 23) do not conflict with the decision in this case because they involved plaintiffs who were demonstrably victims of actual discrimination. *General Motors Corporation v. City of Los Angeles*, 35 Cal. App. 4th 1736, 42 Cal. Rptr. 2d 430 (1995), is little more than a clone of *Armco* and *Tyler Pipe*, the only difference being that the taxing jurisdiction was a city rather than a state. In *Sprint Communications Company v. Kelly*, 642 A.2d 106 (D.C. Cir.), *cert. denied*, 115 S. Ct. 294 (1994), the court applied the internal

this extra step, not required by the decisions of this Court, but of Petitioners' own devising, that the Minnesota court refused to take.

Even if the Court believes that the Minnesota court erred and incorrectly applied the internal consistency test in this case, there is no compelling reason to grant the petition. If Petitioners were correct that the internal consistency test requires the examination not only of the logical consequences of cloning a state tax, but of the financial structure of hypothetical taxpayers as well, this

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consistency test to invalidate a taxing scheme which, if applied by every state, would have inevitably resulted in higher taxes on interstate telecommunications carriers. In *Sprint*, the Commerce Clause violation arose from the fact that the affected taxpayers would have paid taxes in other states *on the same tax base* which triggered the District of Columbia's gross receipts tax. The unavoidable threat of multiple tax burdens on the same tax base likewise underlies the decisions in *Barringer v. Griffes*, 1 F.3d 1331 (2d Cir. 1993) and *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). Both cases involved taxation of motor vehicles. In *Barringer*, Vermont imposed a 5% use tax on autos using the state's highways. In *Kuhnlein*, Florida imposed an "impact fee" of $259 on all title certificates issued in the state. In each case, it was absolutely clear that *any* motor vehicle licensed and operating in more than one state during its lifetime (including those owned by the plaintiffs) would be subject to multiple tax burdens if all states were to impose the same fees or taxes. Unlike the cases cited by Petitioners, however, in this case the threat of multiple taxation of an actual taxpayer cannot be demonstrated, even if it is assumed that all states impose an identical tax. Neither the regular franchise tax, which is apportioned, nor the factors-based AMT tax, which is imposed solely on a taxpayer's Minnesota-based payroll, property and sales, exposes the same tax base to a risk of multiple taxation by other states. That no other court has addressed the issue raised in this case indicates that it is either insignificant or not ripe for resolution by the Court.

case would present, at most, the possible misapplication of a properly stated rule of law.[9]

Moreover, the issue in this case is one which is not likely to recur. As Petitioners point out, only Minnesota, among the 50 states, has ever imposed a factors-based alternative minimum tax on corporations. Pet. at 6. As noted by the Minnesota Supreme Court, this form of tax was in effect only from 1987 to 1989, and was replaced by a corporate alternative minimum tax based on the federal tax code. Minn. Stat. § 290.0921 (1994). *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 287, Pet. App. 3a. The issue in this case is therefore hardly one of profound national significance, requiring resolution by this court.[10]

Furthermore, no manifest injustice resulted from the limited, three-year imposition of this tax, such that this Court should grant the petition to provide relief to unidentified injured taxpayers.[11] No taxpayer was shown to

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[9] As Rule 10 states, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

[10] If the Court wishes to consider whether geographically limited non-refundable state tax credits discriminate against interstate commerce, a case involving widely-implemented credits (job credits or research and development credits, for example) which affect a large number of actual taxpayers would present a more appropriate opportunity for review. In the courts below, Petitioners raised a separate claim of discrimination against interstate commerce based on the non-refundable credit aspect of the tax (Pet. App. 10a), but they have abandoned it here. See *infra*, notes 17-18 and accompanying text.

[11] Remedial issues were not addressed by the trial court or the Minnesota Supreme Court. Since the matter was bifurcated

have been negatively impacted by the AMT, even when it is assumed that every state imposed the same tax as Minnesota. In fact, the evidence showed that it would take an unusual combination of circumstances for a "violation," as Petitioners defined it, to occur. *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290, n.2, Pet. App. at 10a n.2.

There is no discriminatory purpose or intent apparent in the Minnesota AMT law, which is facially neutral. The tax base and very low tax rate of .1% were the same for every corporate taxpayer doing business and subject to taxation in Minnesota. Nor was the tax directed specifically at economic activity occurring only at a particular location. As Petitioners' argument reveals, whatever theoretical disadvantage the tax might impose on certain companies is the result of their profitability, the structure of their apportionment factors, and the fact that their business activities are subject to taxation in more than one jurisdiction, and is not the logical consequence of cloning the tax.

In light of the fact that no facial discrimination against interstate commerce has occurred, no actual taxpayer has been shown to be harmed, and no similar tax is in effect in any state, including Minnesota, there is no compelling reason for this Court to grant the petition.

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as to liability and remedy, and because Respondents prevailed below, only the liability phase of the trial was conducted.

## II. PETITIONERS FAILED TO MEET EITHER THE COURT'S OR THEIR OWN TEST FOR A "VIOLATION" OF THE INTERNAL CONSISTENCY REQUIREMENT UNDER THE COMMERCE CLAUSE, WHICH WAS CORRECTLY APPLIED BY THE MINNESOTA SUPREME COURT.

Petitioners argue that the decision of the Minnesota Supreme Court incorrectly "blurs" the "bright-line" internal consistency test under the Commerce Clause and turns it into a "quagmire." Pet. at 15, 19. Even if this were true, Petitioners' argument is beside the point, as are the cases on which they rely. Whatever the benefits of "bright-line" tests might be, none of the cases cited by Petitioners in Part I of their petition, at pp. 15-18, involved a serious challenge to a state tax on internal consistency grounds.[12]

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[12] *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) and *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), were sales tax cases which focused on the nexus requirements under both the Due Process Clause and Commerce Clause. The bright-line standard established in those cases had nothing to do with internal consistency. Instead, *National Bellas Hess* and *Quill* established and reaffirmed, respectively, the physical presence nexus requirement for determining whether a state may constitutionally compel a vendor to collect the state's use tax. Likewise *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, 115 S. Ct. 1331 (1995), while referring briefly to the internal consistency standard, disposed of it in two sentences. 514 U.S. at ___, 115 S. Ct. at 1338. The balance of the opinion in *Jefferson Lines* is concerned with the issue of "external consistency," which, in the Court's words, "looks not to the logical consequences of cloning, but to the economic justification of the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to

The Minnesota court properly articulated the internal consistency test in its decision, citing *Container* and *Goldberg* and quoting the Court's most recent explanation of the test in *Jefferson Lines. In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d 285, 289-90 (1996), Pet. App. 7a-8a. In applying the test, the Minnesota court correctly recognized that the test requires the theoretical assumption that every state imposes the same tax. *Id.* at 290, Pet. App. at 9a.

As the Minnesota court noted, however, Petitioners' proposed test requires that additional assumptions be made about the financial circumstances of a hypothetical taxpayer. If there is a "quagmire" here, it is of Petitioners' own making. Instead of the "bright-line" standard they claim to support, Petitioners propose a tax requiring the Court to examine not only the structure of the tax, but also the financial circumstances of *specific taxpayers* in order to determine whether a "violation" of internal consistency, as they have defined it, occurs. The Minnesota court wisely declined the invitation to become mired in that swamp, as should this Court.

### A. Petitioners' Proposed Test, And Not The Decision Of The Minnesota Supreme Court, Blurs The Internal Consistency Requirement.

Petitioners' definition of a "violation of internal consistency" is set forth in the report of Petitioners' mathematics expert. Pet. App. 69a. The test proposed by

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economic activity within the taxing state." *Id.* (citations omitted). Petitioners, in their hypothetical mathematical challenge, do not question the external consistency of the Minnesota tax.

Petitioners' expert requires examination of a particular hypothetical taxpayer's liabilities in each state where it does business, assuming a tax law identical to Minnesota's is in effect in each state. As the expert's testimony makes clear, there can be no "violation" (as Petitioners defined it) except within a narrow range of possible incomes which might be assumed for a fictional corporation. Pet. App. 70a.

Thus, as Petitioners' expert formulated the test, no violation of internal consistency occurs unless a particular corporation's income falls within a certain range, relative to the structure (*i.e.*, size and distribution) of its apportionment factors. This range is not constant, but varies according to the financial circumstances of each imaginary taxpayer.[13]

It is uncontroverted that Petitioners presented no evidence that they, or any actual taxpayer, would have had a higher total tax liability, assuming tax laws identical to Minnesota's were in effect in all states, than if their businesses were concentrated in a single state.[14] Thus,

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[13] In the case of his hypothetical X Corporation, the range of incomes Petitioners' expert claimed to be within his "zone of violation" was quite limited, from $206,384 on the low end to $1,819,257 on the high end. Pet. App. 77a. Even at the high end of this range, however, X Corporation's return on investment would be a very low (and highly unusual) 3.1%. *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290 n.2. Pet. App. 10a n.2.

[14] As to the three representative plaintiffs below, only Fairway Foods, Inc. would have been a possible candidate for such proof. Juba's Inc., which has not joined in the petition, operates entirely within Minnesota, and thus has no Commerce Clause claim. Henkel Corporation had no federal or Minnesota

Petitioners failed to show that they have met even their own test for when a violation of internal consistency occurs. Rather, Petitioners asserted that they should not be required to show a violation as they had defined it. Petitioners argued that instead they should be required to show only the theoretical possibility that some fictional interstate company might have a higher total tax liability than it would have if its business were concentrated in a single state. As the Minnesota court pointed out, "according to [Petitioners], once a *potential* variation is established between interstate and intrastate tax liability, the tax scheme violates the internal consistency test under the Commerce Clause and therefore must be struck down." *In re Alternative Minimum Tax Refund Cases*, 546 N.W. 2d at 290 (Minn. 1996) (emphasis in original); Pet. App. 9a.

This Court has stated, however, that the mere possibility of unequal treatment does not justify invalidating a tax on Commerce Clause grounds. In *Associated Industries of Missouri v. Lohman*, 511 U.S. ___, ___, 114 S. Ct. 1815, 1824 (1994), the Court observed:

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taxable income during the 1987 tax year in question. Thus Henkel would have been subject to the factors-based AMT in every state in which it does business if tax laws identical to Minnesota's were in effect in all 50 states, and the most it would owe is the .1% AMT on 100% of its factors. Under these circumstances, no "violation" would have occurred, according to Petitioners' expert. Pet. App. 70a. As far as Fairway Foods is concerned, Petitioners simply made no attempt to show that it would have been subject to higher tax burdens on an interstate basis if a tax identical to Minnesota's was in effect in all 50 states.

> But we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands. On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in "effect," *see, e.g., Bacchus Imports Ltd. v. Diaz*, 468 U.S. 263, 270, 104 S. Ct. 3049, 3054, 82 L.Ed.2d 200 (1984), and we have emphasized that "equality for the purposes of . . . the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton*, 373 U.S., at 70, 83 S. Ct. at 1204. *See also Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481, 52 S. Ct. 631, 635, 76 L.Ed. 1243 (1932) ("Discrimnination, like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries").

In this case there has been no showing of discrimination in "effect," even when it is assumed that all states impose the identical tax. In the absence of such a showing, Petitioners cannot prevail in their claim that the tax is unfairly apportioned because it lacks internal consistency. Furthermore, having also failed to meet a test they themselves urged on the trial court, it ill behooves Petitioners now to complain that the Minnesota Supreme Court imposed the wrong test.[15]

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[15] Petitioners' attempt to make much of the fact that the trial court cited language from *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159, 169-70, requiring "clear and cogent" evidence of malapportionment. Pet. 7-8. Petitioners state that the trial court "misread" *Container*, because the "clear and cogent" language appears in the context of a discussion of the external consistency aspect of fair apportionment. This is a

### B. Even If Petitioners' Hypothetical Corporation Is Assumed To Exist, The Minnesota AMT Does Not Violate The Internal Consistency Test.

Even if Petitioners' hypothetical corporation is assumed to exist, the additional tax burden shown in the example they used does not result from a lack of internal consistency.

As Respondents' expert economics witness established at trial, the additional tax burden which Petitioners' claim befalls their hypothetical taxpayer arises from factors not addressed in the internal consistency cases cited by Petitioners, including the weighted sales factor in Minnesota's apportionment formula, and the non-refundable credit for regular franchise taxes. T. 267-74.

With respect to the apportionment factors, Respondents' expert testified that an increased total tax burden on certain corporations resulted from Minnesota's adoption, at the same time the factors-based AMT was introduced, of a mandatory weighted apportionment formula.[16] T. 273-74. Petitioners do not challenge the

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red herring. As the Minnesota Supreme Court observed, "The parties in this case agree that the internal consistency test was correctly summarized by the district court in this case." *In re Alternative Minimum Tax Refund Cases*, 546 N.W.2d at 290, Pet. App. at 8a.

[16] Prior to 1987, Minnesota used either an unweighted, three-factor formula or a sales-weighted formula (70% sales, 15% payroll and 15% property), whichever resulted in the lower percentage of income apportioned to Minnesota. Minn. Stat. § 290.19 (1986). Taxpayers whose income was subject to

weighted apportionment formula as inherently unfair. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978) (upholding Iowa's single-factor apportionment formula which used only sales).

Respondents' expert also showed that *any* state taxing system which includes non-refundable credits "violates" internal consistency as Petitioners have defined it. T. 270-71. His testimony in this regard is uncontroverted.[17] Both weighted apportionment formulas and non-refundable credits are extremely common among state corporate tax schemes. Minnesota is not unusual in having these features in its tax system. For example, Respondents' expert identified 29 states that provide tax credits to corporations for creating jobs and increasing employment in the taxing state. T. 267, 274. If the Minnesota AMT violates internal consistency because it interacts with the regular franchise tax as though the franchise tax is a non-refundable credit, then so does any tax system which includes such credits, including the business tax systems of Minnesota and many other states.[18]

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apportionment also had the option of electing a third method under the Multistate Tax Compact. Minn. Stat. § 290.171 (1986).

[17] The factors-based AMT and the Minnesota regular franchise tax interact as though the taxpayer receives a credit for its regular franchise tax liability, if any, against its AMT. As a result, the taxpayer pays the higher of the two taxes. Findings F.2, F.3, Pet. App. 29a; Conclusions 1.C, Pet. App. 33a.

[18] This case would be a poor vehicle for deciding whether non-refundable credits discriminate against interstate commerce. Such credits are more appropriately analyzed under the discrimination prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), not the fair apportionment prong (of which internal consistency is an aspect). See *supra* note 10.

Provision of a credit for any regular franchise tax liability against the AMT should not be construed as creating a constitutional problem where none would otherwise exist. There are sound public policy reasons why the Minnesota Legislature chose to provide the credit for regular franchise taxes. One of the goals of the AMT was to provide some degree of relief to profitable corporations by leveling the tax burden and lowering the overall tax rate. The Legislature could simply have added the AMT on top of the regular franchise tax, but this would have increased the existing tax burden on the most profitable taxpayers who were already paying the majority of corporate taxes. Instead, the Minnesota Legislature reasonably chose to impose the factors-based AMT as an alternative tax in order to achieve its goals of enhanced revenues, reduced volatility and a broadened tax base.[19]

This is not a case where "one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed." *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. ___, ___, 115 S.Ct. 1331, 1338 (1995). The potential for an increased tax burden, if any, resulting from the Minnesota AMT arises from factors outside the purview of the internal consistency test. Just as "sales with at least partial performance

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[19] The Minnesota Legislature provided for a five-year carryforward of a credit for any AMT paid against future franchise tax liabilities, so that taxpayers which achieved higher levels of taxable income in subsequent years could take advantage of previously paid AMT taxes. Minn. Stat. § 290.06, subd. 21 (Supp. 1987). For many corporations, this carryforward feature substantially reduced or eliminated any AMT liability (over and above their regular franchise tax liability) over time.

in the taxing state justify that state's taxation of the transaction's entire gross receipts in the hands of the seller," *id.* at 1340, so the presence of a taxpayer's payroll, property or sales in Minnesota justifies Minnesota's taxation of those bases at any reasonable level without regard to whether another state might tax the taxpayer's property, payroll or sales located in *that* state.

As Petitioners' expert acknowledged, there can be no "violation" of internal consistency (as Petitioners have defined it) unless at least one state imposes the factors-based alternative minimum tax and at least one other state imposes the income-based franchise tax on the same taxpayer. Pet. at 11 n.3. This risk of a higher total tax bill on corporations doing business across state lines is always present, however, and has nothing to do with internal consistency. The risk Petitioners complain of arises from the fact that different states may impose their taxes on different tax bases without violating the Constitution. As this Court has stated,

> The multiple taxation placed upon interstate commerce by such a confluence of taxes is not a structural evil that flows from either tax individually, but it is rather the "accidental incident of interstate commerce being subject to two different taxing jurisdictions." Lockhart 75; *See Moorman Mfg. Co.*, 437 U.S., at 277.

*Jefferson Lines*, 514 U.S. at ___, 115 S. Ct. at 1342 (footnote omitted).

The higher tax burden in Petitioners' hypothetical example does not arise from improperly apportioned taxes, but from the fact that a taxpayer operating entirely within one state is subject only to that state's taxes, while

the multistate corporation may be exposed to more than one type of tax. The Minnesota AMT is, in effect, two separate taxes, only one of which would be imposed on a particular taxpayer in any given year by each state imposing such a tax.[20]

The situation in this case is analogous to *Amerada Hess Corp. v. Director, Division of Taxation*, 490 U.S. 66 (1989). In *Amerada Hess*, the taxpayer, an oil producer, challenged certain "add back" provisions of New Jersey's

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[20] In *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984), the Court noted that the out-of-state taxpayer would also have a higher total tax burden than a manufacturer located entirely within the taxing state, if the out-of-state taxpayer's "home" state imposed a tax only on manufacturing, while West Virginia imposed a tax only on wholesaling. The Court stated:

> In that situation, Armco would bear two taxes, while West Virginia sellers would bear only one. But such a result would not arise from impermissible discrimination against interstate commerce but from fair encouragement of in-state business. What we said in *Boston Stock Exchange*, 429 U.S. at 336-337, 97 S. Ct. at 610, is relevant here as well:
>
> > Our decision today does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry. Nor do we hold that a State may not compete with other States for a share of interstate commerce; such competition lies at the heart of a free trade policy. We hold only that in the process of competition no State may discriminatorily tax the products manufactured or the business operations performed in any other State.

*Armco*, 467 U.S. at 645-46.

business corporation tax which denied crude oil producers a state tax deduction for federal windfall profits taxes paid. The Court rejected the claim that the add-back provision discriminated against oil producers who marketed oil in favor of independent retailers who were not involved in oil production, an entirely out-of-state activity. The Court stated that "whatever disadvantage this deduction denial might impose on integrated oil companies does not constitute discrimination against interstate commerce. . . . Whatever different effect the add-back provision may have on these two categories of companies results solely from differences between the nature of their businesses, not from the location of their activities." *Id.* at 78.

In this case, whatever differences in effect the combination of the Minnesota corporate franchise tax and the factors-based alternative minimum tax may have had on various taxpayers results from differences in their profitability and their exposure to multiple taxing jurisdictions. In the absence of any facial discrimination against interstate commerce, or any demonstrated actual violation of the internal consistency requirement, the Minnesota Supreme Court reasonably concluded that no constitutional violation had been proven. Where no actual taxpayer has been shown to have been harmed by the tax – even when it is assumed that every state imposed the identical tax – no federal issue justifying further review by this Court has been raised.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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